

UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240

Secretary of the Interior Rogers C. B. Morton

Office of Hearings and Appeals . . . James M. Day, Director

Office of the Solicitor . . . Mitchell Melich, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

Edited by
Vera E. Burgin
Henry D. Myers



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1972 to December 31, 1972. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Rogers C. B. Morton served as Secretary of the Interior during the period covered by this volume; Mr. William T. Pecora (deceased) served as Under Secretary; Messrs. Richard F. Bodman, Hollis M. Dole, John Larson, Harrison Loesch, Nathaniel Reed, James R. Smith served as Assistant Secretaries of the Interior; Mr. Mitchell Melich served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor. Mr. James M. Day, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "79 I.D."

A handwritten signature in cursive script, reading "Rogers C. B. Morton". The signature is written in dark ink and is positioned above the printed title.

Secretary of the Interior

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ERRATA

- Page 3—Footnote 5, correct sec. 3 (a) (4) to read 3 (e) (4).
- Page 18—Headnote—Line 3 should read on such *Known* geologic structure, is also ***.
- Page 27—Headnote—Line 4 should read is *scarce* does not make it an “uncommon variety” ***.
- Page 44—Par. 1, line 9 the word *seven* is corrected to read *eight*.
- Page 45—Par. 2 is changed to read: Of the claims involved in this case, the Enterprize (Nevada 062291) is located in sec. 2, T. 15 N., R. 20 E., M.D.M., Ormisby County, Nevada, the Gypsite Placer (Nevada 062290) in sec. 25 and 36, T. 16 N., R. 20 E., and the War Bond, Gypsite, Gypsite Extensions 1-4, (Nevada 062289) in sec. 31, T. 16 N., R. 21 E., M.D.M., Lyon County, Nevada.
- Par. 3, the first word is changed to *seven*.
- Page 52—Right col. the fourth word of the first full paragraph is changed to *eight*.
- Page 54—Footnote 9, correct citation to read (9th Cir. 1971).
- Page 67—Right Column, Headnote 3, Line 5, begin new paragraph—*Even if there is* ***.
- Page 125—Column 2—Line 3 correct *responsibility*.
- Page 160—Column 1, Headnote 2—Line 4 correct *disclose*.
- Page 161—Left column, Line 4, delete *a*.
- Page 213—Footnote 82, citation should read Koenig Aviation, Inc., ASBCA.
- Page 256—Correct Pagination for Strawberry Valley from 256 to 526.
- Page 382—Column 1, par. 2, 3rd line from the bottom, delete the word *in*.
- Column 2, Line 18 delete figure 1 from citation *United States et al*.
- Page 397—1st col., line 1 add preceding *Parentheses*.
- Page 398—Par. 3, line 2 add the word *the* survey.
- Page 430—8 pt. par.—Correct stat, for treaty to read (1951.) sic.
- Page 431—Renumber Preprint Nos. 7 and 8 should appear as 431A.
- Page 444—Right Col. Caption “Separate Concurrence” Line 10 correct believer to *believe*.
- Page 459—2d col.—line 8 correct citation to read United States v. United States Borax Co., 58 I.D. 426 (1943)———
- Page 625—2d Headnote Regulation should read 43 CFR 4.546(a).
- Page 618—Col. 1, correct citation to read Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958).
- Page 635—Footnote 3, citations should read, Consumers Union of U.S., Inc. v. Veterans Administration, 301 F. Supp. 796 (1969) and 436 F. 2d 1363 (2d Cir. 1971).
- Page 696—8 pt. par., line 20, correct citation to read 37 Stat. 678.
- Page 706—Right Col. 1st par., line 8, add to citation, 79 I.D. 501.

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Bess May Lutey, et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Judgment for defendant, December 10, 1970; no appeal.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

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Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

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Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard, et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

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Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

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Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

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Henry S. Morgan, et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, February 20, 1961 (opinion); aff'd., 306 F. 2d 799 (1962); cert. denied, 371 U.S. 941 (1962).

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Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); cert. denied, 392 U.S. 909 (1968).

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Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, October 29, 1963 (oral opinion); aff'd., 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alas. Dismissed without prejudice, March 2, 1964; no appeal.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, December 19, 1958.

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***Southern Pacific Co.*, 76 I.D. 1 (1969)**

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- Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.

- Franco-Western Oil Company *et al.* (Supp.), 65 I.D. 427, is adhered to, 66 I.D. 362.
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181.
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Glassford, A. W. *et al.* 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg *et al. v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R. R. Rousseau, 47 L.D. 590).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Gwyn, James R. (A-26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.
- Hagood, L. N., *et al.*, 65 I.D. 405 (1958); overruled, Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).
- Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.

- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg *et al. v.* Orr *et al.* (25 L.D. 232); overruled, 38 L.D. 253.
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.
- Herman *v.* Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.
- Hickey, M. A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holbeck, Halvor F., A-30376 (December 2, 1965); overruled, 79 I.D. 416 (1972).
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696); decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624); modified, 19 L.D. 86, 284.
- Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92) (See 39 L.D. 411).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- *Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).
- Hull *et al. v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.
- *Hyde *et al. v.* Warren *et al.* (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).
- *Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).
- Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.
- *Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53

- I.D. 365; *Lillian M. Peterson et al.* (A-20411), August 5, 1937, unreported (See 59 I.D. 282, 286).
Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.
Jacks v. Belard et al. (29 L.D. 369); vacated, 30 L.D. 345.
Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.
Johnson v. South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.
Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
Jones v. Kennett (6 L.D. 688); overruled, 14 L.D. 429.
Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929), overruled in part. *Arizona Public Service Company,* 5 IBLA 137, 79 I.D. 67 (1972).
Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.
Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
Kilner, Harold E. et al. (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
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Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
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Knight, Albert B. et al. (30 L.D. 227); overruled, 31 L.D. 64.
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Kniskern v. Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
**Krushnic, Emil L.* (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
Largent, Edward B. et al. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
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Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
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Layne and Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with *Schweigert, Inc. v. United States, Court of Claims No. 26-66* (Dec. 15, 1967), and *Galland-Henning Manufacturing Company, IBCA-534-12-65* (Mar. 29, 1968).
Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.

- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Lindermann v. Wait (6 L.D. 689; overruled, 13 L.D. 459).
- *Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonnergran v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.

- McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMiken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al.* *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee *v.* Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946); overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al.* *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Moñrow *et al.* *v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mountain Fuel Supply Company, A-31053 (December 19, 1969), overruled, 79 I.D. 216 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).
- National Livestock Company and Zack

- Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles *et al.*, 5 IBLA 209, 79 I.D. 109 (1972). Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.
- Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.
- Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.
- *Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).
- Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224.
- Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.
- *Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.
- Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- *Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4,

- 1921 (M-6397) (See 58 I.D. 158, 160).
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

LIMITED ACCESSIBILITY FOR PUBLIC TO PRIVATELY COPY- RIGHTED DATA MACHINE PROC- ESSED BY GOVERNMENT

Copyrights

Public access to government information storage output restricted to visual inspection where the data input is accepted from private parties with tacit recognition of use limitations they set based on their copyrights in such data.

Administrative Procedure: Public In- formation

Excepted from the ordinarily free public availability of government records are machine-retrievable records derived substantially out of a data base formed from copyrighted publications obtained with limited rights by the Government for its own use.

M-36848

January 12, 1972

BRANCH OF PATENTS

December 20, 1971

TO: DR. RICHARD MEYER, OFFICE
OF OIL AND GAS.

SUBJECT: MACHINE-RETRIEVABLE
DATA BASE OF INFORMATION ON
UNITED STATES OIL AND GAS FIELDS,
COMPILED FOR THE OFFICE OF OIL

AND GAS BY THE UNIVERSITY OF
OKLAHOMA RESEARCH INSTITUTE
UNDER OFFICE OF OIL AND GAS CON-
TRACT No. 14-01-0001-2089.

This is our response to your verbal request for an opinion on the propriety and legality of allowing the general public unrestricted accessibility to the contents of the subject data base. We are advised that the contents of this data base are in large part the copyrighted materials of private parties, and their use by the Government is by permission of the copyright owners. Deemed to have a bearing on the matter before us are the Copyright Law, Title 17, of the U.S. Code, including pending legislation, S. 644, 92d Congress, 1st Session, on revision of this law, court-made law relevant to the copyright questions presented herein, and the Freedom of Information Act, 5 U.S.C. sec. 552. This law has been review along with the OOG Technical Report 71-1, constituting a two year progress report on the work done pursuant to the subject contract, and correspondence to you and the contractor from the private parties who supplied the data. We note that out of the eight such suppliers of data only three appear to

79 I.D. Nos. 1, 2 & 3

have granted an unlimited use of the data subject only to being given credit for their contribution when it is used. The other parties supplied data for use more or less limited to government activities, including the establishment of the data base. Consideration of the foregoing has indicated the following:

(1) To facilitate copying by the public, whether by way of a magnetic transfer or a duplication in writing, could amount to contributory infringement by the Government of copyrights owned by the private parties. Consequently, the data base should not be made freely accessible to the general public. Since permission granted the Government evidently allows the reading out and making records from the data base, copies of such records can be made for government use including the disposition of these records where the public may inspect but not copy them. By its acceptance without objection of the copyrighted material for input to computer storage, the Government effectively adopted the limited authorization provided by the copyright owners, wherefore government authorization for use by third parties is not available. It is a widely held view that unauthorized read-out from computer storage of copyrighted material is a copyright infringement.¹ Because of the highly commercial nature of the material

involved in this instance, and the use which third parties are likely to make of such material, we do not believe that court made law such as "fair use"² or "insubstantial similarity"³ would be applicable to mitigate an infringement action that might be brought by a copyright owner.

(2) In view of our first conclusion, requests by some of the aforesaid private contributors for copies of the data base material cannot be honored in the absence of an agreement between and among such contributors and with the Government, that such party have the right to receive copies of any of the data base material made available for that purpose by the Government. No difficulty is foreseen in reaching such an agreement since it would be mutually advantageous to all concerned. We recommend that an agreement of this sort be made.

The Freedom of Information Act recognizes the special proprietary status of confidential geological and geophysical information and data concerning oil and gas wells by exempting such material from free disclosure.⁴ However, even though no questions of confidentiality arise herein, the material involved is none

² *Rosemont Enterprises, Inc. v. Random House, Inc.*, 150 U.S.P.Q. 715 (1966), see discussion on pages 718 and 719.

³ *Mathews Conveyer Co. v. Palmer-Bee Co.*, 57 U.S.P.Q. 219 (1943), see discussion on pages 229 to 331.

⁴ Administrative Procedure, section 3(e) (9), see discussion in Attorney General's Memorandum on the Public Information Section of the APA, U.S. Dept. of Justice, June 1967, page 39.

¹ Committee report on Copyright Law Revision, report 83, 90th Congress, 1st session, page 25.

January 13, 1972

the less valuable property and the Government's acquiescence to a limited use of such property is felt to also exempt it from the full effect of the Act.⁵ Therefore, as indicated above, government records of the copyrighted data base materials may be made available in any manner you see fit for inspection, but not for copying.

ERNEST S. COHEN,
Assistant Solicitor.

⁵ Id, section 3(a)(4), relating to privileged information obtained by the Government with limited rights.

RIGHTS TO INVENTION MADE BY EMPLOYEE

Inventions

Under Department's Patent Regulations, 43 CFR 6, subpart A, section 6.5, employee-inventor retains all rights, subject to law, in an invention he made having utility in his official duties where such duties do not include devising innovations, or participation in research and development, and the Government's contribution to making the invention is insignificant.

Inventions

Employee invention in an intangible notation system appearing to be outside the statutory classes of invention eligible for patent protection is not an appropriate subject for a patent application to be filed at government expense in exchange for license to Government.

Inventions—Federal Employees and Officers: Awards

Employee-inventor's acceptance of government cash award given in consideration of his making invention would secure for the Government a right to use inven-

tion free from any further claim that might be based thereon; 5 U.S.C., sec. 2123(d) (1964).

M-36814

January 13, 1972

BRANCH OF PATENTS

November 16, 1970

TO: ASSOCIATE DIRECTOR, BUREAU OF LAND MANAGEMENT

SUBJECT: NUMERICAL CODING OF LEGAL LAND DESCRIPTIONS FOR AUTOMATIC DATA PROCESSING (ADP), BY THOMAS N. HARDIN (BLM-1752).

The Solicitor's Opinion has been requested regarding the respective rights of the employee-inventor Thomas N. Hardin and the Government in the invention of the subject report.

The invention relates to a method of specifying a parcel of land as to its size and location in a particular square mile unit of land by determining a characterizing three digit number designation therefor. This is done by regarding the unit and regular subdivisions thereof as indexed with a predetermined pattern of digits wherein the digits have a fixed positional and arithmetical interrelationship appertaining to both location and size, and accordingly are the basis for a designative number, as aforesaid. The numerical identification of land as proposed by the invention would greatly facilitate handling land records using automatic data processing equipment.

At the time the invention was made Mr. Hardin was employed by the Bureau of Land Management at its Colorado State Office as a Realty Specialist. The employee-inventor's principal duties included the collection, creation, and maintenance of records pertaining to the Bureau's activities relating to an oil shale project in Colorado, Utah and Wyoming. Under Mr. Hardin's direction his branch systematically obtained county records of mining claims located on particular oil shale lands, and microfilmed pertinent records for processing data therefrom using automatic data process equipment to produce indexes of claims, locators, owners, and blocks of claims. He thus created files on unique claims with document histories and status data for routing to Land Offices of the Bureau for serialization and posting to the public land records. Among Mr. Hardin's other duties were maintaining maps, plots, listings, and charts to show progress of claims, inventories, abstracting and related items of processed land records.

The report indicates that the invention was developed in the employee-inventor's home, on his own time, and with the use of simple household materials such as a brown paper bag on which the concept of the invention was illustrated. Also mentioned is that a minor variance in a number format of the invention resulted from a suggestion by another government employee. The significance of this contribution to

the invention as a whole appears to be slight enough so as not to become a factor in the present determination. Further noted is that final drafting and reproduction of the illustration used in the subject report were made at government expense. However, since such work was done for the purposes of an internal critical review of the invention by the Bureau, and subsequently used in connection with the preparation of the instant report, the expense incurred by the Government was for its own benefit, and therefore is also not considered a determinative factor in the matter herein.

It is apparent from Mr. Hardin's official duties that he is not required to devise or invent new procedures or equipment, or to participate in research or development work. Although the subject invention would very likely have utility in those areas of Mr. Hardin's work pertaining to the creation of record files on land claimants and their holdings, this invention does not bear a direct relation to any part of his official duties, nor was the invention made in consequence thereof.

In view of the absence of any direct connection between Mr. Hardin's official duties and the making of the invention, and the lack of any significant contribution by the Government thereto, there are deemed to be no equitable grounds to justify a requirement of an assignment to the Government of the entire domestic

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right, title and interest in and to the invention, nor for a reservation of a license therein. Accordingly, the entire right, title and interest in and to the invention is left with Mr. Hardin, subject to law, pursuant to section 6.5(b) (4) of the Department's Patent Regulations (43 CFR 6A).

A request by the employee-inventor that the prosecution of a patent application on his invention be undertaken at government expense in the event it should be determined he is not required to assign all domestic rights to the invention to the Government, has been considered. Any patent resulting from such prosecution would be subject to a license in the Government.

Due to the nature of the subject invention, namely the use of numerical indicia for systematically identifying the substance of land records, it is not certain whether this invention falls into one of the statutory classes for which patents may be secured.¹

In essence, the invention herein would correspond a meaningful number to a document as an aid to an understanding of its contents. Thus, any claim to patentability for the invention would in effect be based on a system of writing involving to some extent a thought process, or mental concept. Since under the patent law only tangible

structures, articles, substances, or processes dealing therewith, are normally deemed eligible for a patent, merely establishing a numerical code would not likely be patentable no matter how mathematically or schematically unique such numbers may be in other respects. This is the prevailing interpretation of the patent law, which may in time be challenged as technology, particularly as related to computer programming, widens the scope of inventive conceptions. Consequently, in view of the present uncertainty as to the patentability of inventions of this type, and the doubtful government interest in using the present invention as indicated by the record in this matter, a patent application will not be filed at government expense. However, Mr. Hardin is at liberty to seek patent protection at his own expense if he so wishes.

Since the invention report was submitted to the Bureau Incentive Awards Committee, it is presumed that a cash award to the employee-inventor is a possibility in this case. Mr. Hardin should therefore be advised that pursuant to 5 U.S.C. sec. 2123(d) (1964) his acceptance of any cash award given in consideration of his making the invention, shall constitute an agreement that the use by the Government of the invention shall not form the basis of a further claim of any nature upon the Government. In effect, an acceptance of an award would give rise to a

¹ § 35 U.S.C. 101 "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter * * * may obtain a patent therefor * * *."

royalty-free license in the invention to the Government.

The determination of rights herein is subject to review and approval by the Commissioner of Patents, U.S. Patent Office. You will be advised as to his action in due course.

ERNEST S. COHEN,
Assistant Solicitor.

MINNIE E. WHARTON, JOHN W. WHARTON, RUTH WHARTON JAMES, CARROLL WHARTON, IRIS WHARTON BARTYL, MARVIN WHARTON, THOMAS WHARTON, BETTY WHARTON ZINK, FAYE WHARTON PAMPERIEN, AND SAMUEL WHARTON

Decided *February 2, 1972*

4 IBLA 287

Appeal from decision (OR 8041) by Oregon state office, Bureau of Land Management, rejecting color of title application.

Affirmed.

Color or Claim of Title: Generally

The purpose and intent of the Color of Title Act, 43 U.S.C. secs. 1068, 1068a, 1068b (1970), is to provide a legal method whereby citizens, relying in good faith upon title or claim derived from some source other than the government, and who have continued in peaceful, adverse possession of public land for the prescribed period of 20 years and had made valuable improvements, or have reduced

some part of the land to cultivation, might acquire title thereto. However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not a good title.

Color or Claim of Title: Generally

One who has not reached his majority (*i.e.* is a minor) may acquire title by adverse possession. However, he must show that he claims the land as against everyone. If he resides on the land with his mother, who has knowledge of the defective title, he is chargeable with that knowledge.

Color or Claim of Title: Good Faith

Good faith in adverse possession requires that a claimant honestly believed there was no defect in his title and the Department may consider whether such belief was unreasonable in the light of the facts then actually known or available to him. Once it is established that the claimant knew that the land was owned by the government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has no title or fails to demonstrate a rationally justifiable reason for believing that he had title.

APPEARANCES: Keith Burns for appellants.

Opinion By Mr. Fishman

INTERIOR BOARD OF LAND APPEALS

The above named parties have appealed jointly from a decision of

February 2, 1972

the Oregon state office, Bureau of Land Management, dated October 22, 1971, which rejected their color of title application, OR 8041, filed pursuant to the Act of December 22, 1928, *as amended*, 43 U.S.C. secs. 1068, 1068a, 1068b (1970).

The applicants had filed a Class 1 application under that Act on May 25, 1971, for the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 21, T. 21 S., R. 38 E., W.M. Oregon, embracing 40 acres. The decision below recited the following facts: Curtis Wharton, husband of Minnie E. Wharton Carlson, and father of the other applicants, made application for the land in issue on September 26, 1919, under the Desert Land Act, *as amended*, 43 U.S.C. secs. 321-339 (1970). His application was allowed on January 12, 1921. The family had lived on and cultivated the land prior to the filing of the desert land application. Curtis Wharton failed to file final proof or make final payment, resulting in the cancellation of his entry on January 23, 1930. He died in 1949. The applicants are purportedly the legal heirs of the deceased. They claim no knowledge of the desert land entry cancellation until some time in 1955 when Minnie Wharton asserts she first learned the land was still owned by the federal government. They further assert that John Wharton (son of Curtis Wharton) first learned in 1957 that the family had no deed to the land. Curtis Wharton began cultivating the land prior to 1919 and the family continuously kept the land under cultivation until 1966.

Improvements to the land included a house, shed, fence, two wells, and electrical power facilities. John Wharton was born on the land in 1933 and lived there until 1966.

Other than the assertion that all individuals involved are the legal heirs of Curtis Wharton, the color of title claim is based on the following assertions: Minnie E. Wharton Carlson held the land in peaceful adverse possession in good faith from 1930 (the date of the cancellation of the desert land entry) until 1955 when she was notified of ownership by the federal government—a period of well over 20 years. John Wharton assertedly held the land in peaceful adverse possession in good faith from 1933, the date of his birth, to 1957, when he recognized the family had no deed, a period of 24 years. The other applicants were born on the land and lived there until they were emancipated. The appellants also based their claim on the placing of valuable improvements on the land.

The decision below concedes that the improvement or cultivation requirements of the statute have been met. However, that decision predicates its rejection on the basis that the appellants have not submitted the crucial element, *i.e.*, a document or evidence of title to the lands upon which a color of title claim could be sustained. It also finds that the appellants were not in good faith because investigations revealed that there are no records indicating payment of any taxes on the land in issue. Also the Malheur

County recorder advised appellants' attorney by letter of April 12, 1971, that "the United States is title holder to this property; there have been no conveyances."

The decision also questions the good faith of the parties since Minnie E. Wharton had knowledge of the desert land entry and the original ownership of the land, as manifested by her signature upon original documents in the desert land entry file, The Dalles 025534, *i.e.*, "Declaration of Applicants", "Affidavits" as to survey and water rights in 1919, and "Testimony of Witness" for the yearly proof in 1923. The decision also recites that a letter to the Bureau of Land Management, dated January 4, 1956, from Mrs. Wharton, contained in the desert land entry file, indicates she had earlier knowledge of the federal title to the land. The decision quotes her as saying, "I wrote to you in December 1954, to find out what to do and how much it would cost to get a deed for this place * * *." Her letter of January 4, 1956, also stated:

I am again writting [sic] you in regards [sic] to the Old Desert Land Entry made by Curtis Wharton * * * [which] was never completed. And he passed away in August 1949 as I wrote you before we made our home on the place since the Early 20ies [sic] and are still making the place our home. The Entry no. 025534, For SW $\frac{1}{4}$ North W. $\frac{1}{4}$ section 21 T. 21 SR 38 E.W.M.

I was advised I could file on this place and prove up as soon as I could put it through. * * * I wrote you in Dec. of 1954 to find out what to do and how much it would cost to get a deed for this

place. Then during the summer of 1955 I had The Bureau of Land Management at Vale, Oregon write you. * * * We can't go ahead with the place untill [sic] we can get a deed for it. I have put in over 20 years on this Place and should be entitled to a deed *or at least a chance to file on the place and then prove up.* But have never recieved [sic] even blanks to file on the place. *Or found out what it would cost to file and prove up.* * * * As we want to build a home. But if we can't deed the place we are not going to put any more money on the place. Hoping [sic] to hear from you in the near future. [*Emphasis supplied*]

In their appeal the appellants assert that there is no question that they held the land in peaceful adverse possession, since they and their ancestor, Curtis Wharton, have lived on the land continuously from before 1919 until recently. They express their disagreement with the finding of the decision below that a document or evidence of title to the lands is an indispensable ingredient upon which a color of title claim must be predicated.

They concede that they have no such documents and argue that the law does not require them. They assert that they had title to the land because they knew Curtis Wharton had entered it under the Desert Land Act, and, since they had remained on the land for a long period of time, they conclude that they had reason to believe the claim was perfected.

They also challenge the finding of the decision below that they have not shown good faith. They argue that the mere fact that there are not records indicating payments of any

February 2, 1972

taxes on the land is irrelevant since the law does not require the payment of taxes under a Class 1 claim. They point out that only a claim based on Class 2, which was added to the statute in 1953, requires evidence of such payments.

They further assert that they should not be presumed to know the county records, more specifically, the statement contained in the Malheur County recorder's office showing the land to be public land. They assert that they believed they had a valid claim to the land and therefore had no reason to check the county records. They also controvert the statement quoted from Minnie Wharton's letter of March 15, 1955, and assert that she did not therein recognize federal title to the land, suggesting that all she sought by that letter was the physical indicium of title. They further assert that until she received the letter from the Bureau of Land Management on March 15, 1955, she had not realized that their occupancy of the land was in trespass and that there was no way of securing documents of title. They also challenge the finding of the decision below that: "the applicants cannot include periods of time beginning prior to 1949 * * *", i.e., prior to the death of Curtis Wharton. Applicants assert their belief that they can include time prior to that event, since they lived on the land prior to that time, and, therefore, claim the land in their own right as well as his heirs. They point out that there is a pending lawsuit

by the United States in the United States District Court for the District of Oregon, Civil No. 70-106, to take possession of the land involved in this case. A deposition of Curtis Wharton in that proceeding indicates that he believed that it was their land because he was born "right on the place and all of my brothers and sisters—and there is [sic] nine of us. And we were born right there and lived there until we was—got away from home." [sic]

We now proceed to consideration of the arguments advanced by the appellants.

It is well established that a claim or color of title must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title. *Peterson v. Weber County*, 99 Ut. 281, 103 P.2d 652, 655 (1939); See *Karvonen v. Dyer*, 261 F.2d 671, 674 (9th Cir. 1958) and *Henry D. Warbasse, Eugenia W. Warbasse*, A-30383 (August 19, 1965).

As was pointed out in *Pacific Coast Co. v. James*, 5 Alaska 180, *aff'd*, 234 F. 595 (1916), "[o]ne cannot make his own title."

The purpose and intent of the Color of Title Act was to provide a legal method whereby citizens relying in good faith upon title or claim derived from some source other than the federal government,¹ who had continued in peaceful, ad-

¹ See *Bernard J. and Myrle A. Gaffney*, A-30327 (October 28, 1965), stipulated dismissal without prejudice, January 17, 1969, *Bernard J. Gaffney and Myrle A. Gaffney v. Stewart Udall*, Civil No. 3-66-22 (D. Minn.).

verse possession of public land for the prescribed period and had made valuable improvements, or had reduced some part of the land to cultivation, might acquire title thereto. *Ralph Findlay*, A-23522 (February 23, 1943). However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not a good title. *William Benton*, A-23258 (November 14, 1942). See *Jacob Dykstra*, 2 IBLA 177 (April 22, 1971); Cf. *Hugh Manning*, A-28383 (August 18, 1960).

Good faith, in adverse possession, requires that a claimant² honestly believed the land was owned by him. In determining whether the claimant honestly believed that there was no defect in his title, the Department may consider whether such belief was unreasonable in the light of the facts then actually known to him. See *Jones v. Arthur*, 28 L.D. 235 (1899).

However, once it is established that the claimant knew the land was owned by the federal government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire

title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has no title. *Dennis v. Jean*, A-20899 (July 24, 1937), citing *Deffebach v. Hawke*, 115 U.S. 392 (1885). An applicant under the Act must show a rationally justifiable reason for believing that he owned the land. See *Myrtle A. Freer et al.*, 70 I.D. 145 (1963).

It has also been held that the period of adverse occupancy subsequent to discovery that the tract is public land is not in good faith and may not be counted towards meeting the statutory 20-year occupancy requirement. *Ephraim R. Nelson*, A-25865 (June 6, 1950). The factor of good faith of the applicant himself is essential to the issuance of patent under the statute. *Anthony S. Enos*, 60 I.D. 329 (1949). See *Lester J. Hamel*, 74 I.D. 125, 129 (1967), *aff'd*, 226 F. Supp. 96, (N.D. Cal. 1963).

Where one person enters upon land in recognition of title of another, in order for the occupant to prevail under the doctrine of adverse possession it must be established that there was a repudiation of the relationship established and claim of title adversely to that of the titleholder, and repudiation and adverse claim must be clearly brought home to the titleholder, since the record of adverse possession will only begin to run from the time of notice of repudiation and if the adverse claim has been brought home to the titleholder.

² The Department adheres to the view that a color of title applicant must show that the occupation of the land was founded on a reasonable basis for the belief that he and his predecessors in interest had title to the land. *Hugh Manning*, *supra*; *Marion M. Pontius*, A-27473 (November 7, 1957); *Clyde A. Philtebaum*, A-25933 (November 8, 1950); *F. C. French*, A-25924 (October 20, 1950).

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Killough v. Hinds, 338 S.W. 2d 707, 710 (Tex. 1960). See POWELL, THE LAW OF REAL PROPERTY, § 1022 (1971). Cf. *Johnson v. Szumowicz*, 63 Wyo. 211, 179 P. 2d 1012 (1947).

An adverse possession based entirely on a mistaken belief that the tract is embraced within one's own holdings is inadequate under the law, since it lacks the basic element of a claim or title derived from some source other than the United States. *John Johnson*, A-25695 (December 30, 1949). See *Christopher A. Merlau*, A-26204 (December 18, 1951).

Applying the law to the facts of the case at bar, it seems crystal clear that the appellants had no rational basis for believing that they owned the land in issue. It strains our credulity to believe that the desert land entryman, Curtis Wharton, was so secretive about his personal affairs that his wife, Minnie E. Wharton (now Minnie E. Wharton Carlson) was unaware of the cancellation of the desert land entry. In any event, by her filings in the desert land entry case it clearly is established that she knew the land was public land and she had no basis for believing that the situation had changed. She and the other appellants stand in the shoes of Curtis Wharton. In *Springer v. Young*, 14 Ore. 280, 12 P. 400, 403 (1886), the court said:

It must be apparent that George W. Springer could not have retained the title to this land against the claim of this plaintiff, so far as yet appears; and, if

he could not, neither can the defendants, who have or claim no other interest therein than such as descended to them as heirs at law of their father, George W. Springer. They stand in the shoes of their ancestor. They take the title which the law casts upon them, affected with the same trusts and equities as it was when their ancestor held it.

See *Whitcomb v. Provost*, 102 Wisc. 278, 78 N.W. 432, 433 (1899). Cf. *Edward T. Harris*, A-27785 (January 19, 1959).

In Minnie Wharton's letter of January 4, 1956, to the Bureau of Land Management she stated that she " * * * should be entitled to a deed or at least a chance to file on the place and then prove up * * *". She complained that she never " * * * found out what it would cost to file and prove up." If the letter is not deemed to be a recognition of federal ownership of the land, at the very least it signifies an awareness that title conceivably could be in federal ownership. In any event, *Springer, supra*, makes her late husband's knowledge attributable to her and the other appellants and also makes clear that "Neither husband nor wife can hold, adversely to each other, premises of which they are in the joint occupancy as a family." *Id.* at 404. Moreover, in the absence of record title in a claimant, persons who occupy premises of which they are purportedly joint owners are not ordinarily considered in adverse possession against each other. 82 A.L.R.2d 44n (1962). It follows that Minnie Wharton's occupancy until Curtis Wharton's death in 1949 was not an adverse

holding and that their children cannot maintain a claim adverse to their father until his death. Curtis Wharton, by filing the desert land application, recognized the federal ownership of the land in issue. Minnie Wharton, by virtue of her participation in the desert land entry proceedings, also recognized the paramount federal title. Their posture is similar to that of a tenant vis-a-vis his landlord. In *Catholic Bishop v. Gibbon*, 158 U.S. 155, 170 (1895), the Supreme Court stated as follows:

* * * But lessees under a claimant or occupant, holding the property for him and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease [or of desert land entry] implies, not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease [or entry]. They, therefore, whilst retaining possession are estopped to deny his rights.

See AM JUR 2d, Landlord and Tenant § 109. Moreover, there is authority to the effect that a tenant may not set up adverse title in himself after the termination of the lease without surrendering possession. *Id.* § 120. See *Springer v. Young, supra* at 403-404.

We next proceed to consider the claim of the appellants other than Minnie Wharton. Their contention that, by virtue of having been born on the land in issue and having lived there for many years, they held the land in good faith in adverse possession is not persuasive. Their fa-

ther, who had recognized federal title by seeking to acquire the land under the desert land laws, died in 1949. His recognition binds them. See *Springer v. Young, supra*. As indicated, earlier, the appellants, other than Minnie Wharton, " * * claim the land in their own right as well as his [Curtis Wharton's] heirs."

It does not comport with reason that John Wharton, who was born on the land in 1933 and purportedly lived there until 1966 was, in his childhood, aware of, or concerned with, the ownership of the land. To suggest that he, in 1933 or shortly thereafter, as a baby or young child, was holding the land in open notorious adverse possession, suggests a faculty for comprehension in a baby or young child which flies in the face of reason. The fact that the other appellants, apart from Minnie E. Wharton and John W. Wharton had been born on the land and lived there until they were emancipated, simply does not lend any persuasive force to the assertion that they held the land in open notorious adverse possession.

We recognize the existence of authority for the proposition that one who has not reached his majority may acquire title to land by adverse possession, 3 AM JUR, Adverse Possession sec. 131. However, there must be an intention to disseise. In *Bradstreet v. Huntington*, 9 U.S. (5 Pet.) 399, 409 (1831) the Supreme Court illuminated this concept as follows:

February 4, 1972

An infant, a feme covert, a joint tenant in common, a guardian, and even one getting possession by fraud, may be a disseisor. * * *

The whole of this doctrine is summed up in very few words, as laid down by Lord Coke, [1 Inst. 153] and recognized in terms in the case of *Blunden and Baugh*, 3 Croke [sic], 302, in which it underwent very great consideration. Lord Coke says: "A disseisin is when one enters intending to usurp the possession, and to oust another of his freehold; and therefore *querendum est a iudice quo animo hoc fecerit*, why he entered and intruded." So the whole inquiry is reduced to the fact of entering, and the intention to usurp possession. These are the elements of actual disseisin; and yet we have seen that one may become a disseisor, though entering peaceably under a void deed, or a void feoffment, or by fraud. * * *

In the light of *Springer* and cases cited in 82 A.L.R.2d 44n, the heirs of Curtis Wharton cannot be regarded as holding the land in adverse possession since they lacked "the intention to usurp possession" as against Mrs. Wharton. Their claim is not adverse to Minnie Wharton who claimed the land until 1955; her knowledge of the defective title binds them.

In sum, the claim of the appellants cannot be recognized since (1) there is an absence of color of title, (2) their claim is not derived from a source other than the United States, (3) their asserted possession did not constitute a repudiation of title in another, (4) their ancestor, Curtis Wharton, had recognized federal title and

they stood in his shoes, and (5) they cannot demonstrate a good faith holding of the land.

Although the appellants point out that payment of taxes is not a prerequisite for a Class 1 claim, the failure to show payment of taxes *at any time* during the asserted adverse possession in good faith is certainly an element which casts great doubt upon the asserted good faith of the appellants. The assertion of claimed ownership of land *in good faith* is negated by the failure to pay taxes therefor for several decades.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

We CONCUR:

EDWARD W. STUEBING, *Member*.

DOUGLAS E. HENRIQUES, *Alternate Member*.

ESTATE OF GRACE FIRST EAGLE TOLBERT (TALBERT) (DECEASED ALLOTTEE NO. 1318 OF THE FORT PECK INDIAN RESERVATION OF MONTANA)

1 IBIA 209

Decided February 4, 1972

Appeal from Decision after Rehearing of the Secretary of the

Interior, Rogers C. B. Morton, approving will.

Affirmed.

130.2 Indian Probate: Appeal: Dismissal

Timely service of a notice of appeal on all adverse parties is a jurisdictional requirement under the Indian probate regulations and failure of a party seeking an appeal to make such service will result in dismissal of the appeal.

APPEARANCES: John Crawford, Indian Legal Assistance Center, for appellant.

Opinion By Mr. Lasher

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal by Lena L. Crispino from a Decision After Rehearing entered by the Secretary of the Interior, Rogers C. B. Morton, on June 29, 1971.¹ At the time of issuance of the Secretary's decision all parties in interest, including the appellant, were advised of their right to file an appeal with this Board in accordance with the provisions of 43 CFR 4.291.

Following the death of the decedent, Grace First Eagle

¹ Ordinarily at this stage of the proceedings the decision would have been rendered by the hearing examiner who conducted the hearings, David J. McKee. However, because of Mr. McKee's unavailability by virtue of his appointment as Chairman of this Board, the Secretary requested that the record in this case be certified to him for decision. Mr. McKee has disqualified himself and has not participated in this decision on appeal.

Tolbert,² on September 8, 1964, a hearing was held on June 18, 1965, for the purpose of ascertaining her heirs and determining pertinent facts surrounding the making and execution of her last will and testament.³ On December 28, 1965, the examiner entered an Order Approving Will and Decree of Distribution.

On March 11, 1966, after the timely filing of petitions for rehearing, the examiner ordered a rehearing to take evidence relating to two monetary claims filed by Dorothy N. Nudo and appellant, respectively, and to allow appellant further opportunity to present evidence in support of her objection to the will.⁴

² Sometimes referred to in the record as Grace Tolbert, Grace Talbert First Eagle, and Grace First Eagle Talburt.

³ The appellant, Crispino, is the daughter and sole heir of decedent. Had decedent died intestate her entire estate would have passed to appellant pursuant to the Montana statute of descent and distribution. By her will, however, the decedent disinherited Crispino and left the various interests in trust lands comprising her estate to two grandsons, Errol Thurman LaBelle and Arden Wayne LaBelle; a granddaughter, Hazel LaBelle; a niece, Marian St. Germaine Green; and two great-grandchildren, Kimberly Imogene LaBelle and Kristine Lee LaBelle. In an affidavit accompanying her will the decedent stated: "I did not mention my daughter, Leona [sic] First Eagle Crispino, Fort Peck Allottee No. 2288, born 3/17/15 in my Will for the reason that she has sufficient interests of her own."

⁴ In her petition for rehearing dated February 24, 1966, appellant claimed that she had deeded certain lands to her mother under duress, thus raising the possibility that a constructive trust might have been created in her favor as to lands comprising the decedent's trust estate. Specifically, Crispino alleged that " * * * some of the land that was willed to others by mother was land that I formerly owned; land that was obtained from me by duress on the part of my mother. This, I will prove at a rehearing."

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On January 23, 1968, Examiner McKee issued an Order Approving Claims After Rehearing sustaining the monetary claims of Nudo and appellant in the sums of \$800 and \$519.63, respectively, and also finding, in effect, that no evidence was presented by appellant at the rehearing which would justify reconsideration of his order approving the will entered on December 28, 1965.

Following the filing of Crispino's first appeal herein the Regional Solicitor issued his decision dated September 5, 1968, remanding the case to the examiner for the taking of further testimony and evidence on the following issues: (1) whether the will of February 24, 1964, should be approved or disapproved, (2) whether appellant could establish a constructive trust, and (3) whether appellant's action of paying a debt of the decedent after the latter's death entitles her to have such payment allowed as a claim against the estate. The examiner's orders of December 28, 1965, and January 23, 1968, were, in all other respects, affirmed by the Regional Solicitor's decision. The second rehearing was held on June 12, 1969, and upon the record thereof the Secretary's Decision After Rehearing of June 29, 1971, was rendered.⁵

⁵ The Secretary held, *inter alia*, that (1) no evidence whatever was offered by the appellant indicating that the decedent lacked testamentary capacity, or that she acted under duress, coercion, or undue influence in executing her will; (2) the equitable elements necessary to impose a constructive trust upon

On August 30, 1971, appellant filed a one-page document in the nature of a notice of appeal⁶ in which she noted her "protest" of the decisions rendered by the examiner and the Secretary and requested another rehearing at which she proposed to prove (1) how she supported her children by "selling land and other personal property and by working at various jobs," and (2) that in 1957 when her health began to fail she had to beg for help.⁷

Although timely filed, the notice of appeal was not served on the parties who shared in the decedent's estate under the decision being ap-

the lands in question were not established, by substantial evidence much less a preponderance of the evidence, and (3) the examiner's allowance of the appellant's claim for \$519.63 was correct and that appellant should also be allowed an additional \$500 for the advance made by her to discharge a part of the \$800 claim allowed to Dorothy N. Nudo, provided that such allowance be reduced by the sum of \$283.56 cash which appellant received from decedent's nontrust estate-making a total allowance to appellant of \$786.07.

⁶ We are inclined to give appellant the benefit of the doubt by treating the pleading as a notice of appeal because the regulation setting forth the procedure for taking an appeal to this Board, 43 CFR § 4.291, requires a party seeking to appeal to first file a notice of appeal within 60 days after the date of mailing of the notice of the decision being appealed.

⁷ On November 1, 1971, appellant filed a six-page document in the nature of a brief entitled "Appeal of Secretary's Decision" in the office of the Area Director, Bureau of Indian Affairs at Billings, Montana. We gather that this pleading was prepared by an attorney in the Indian Legal Assistance Center. Although served on the examiner, the Superintendent, and all parties sharing in the estate as required by the regulation, it would not benefit appellant for us to construe this document as a notice of appeal instead of a brief on appeal since it was filed more than four months after the issuance of the Secretary's decision and is thus untimely.

pealed, as required by the pertinent regulation, 43 CFR sec. 4.291(b).⁸ Also, the notice itself is deficient in form by virtue of its failure to contain an affidavit or certificate setting forth the names of the parties served and their last known addresses. Finally, with respect to appellant's request for a third rehearing, we note that even if appellant were given the opportunity to establish the allegations contained in her notice of appeal, the result would be the same since such allegations have no relevance to any factual or legal issues which might provide the basis for amending or setting aside the Secretary's decision.

Even by treating the papers filed by appellant herein in the light most favorable to protecting her

⁸The regulations governing appeals have been the subject of recent revision. The regulations quoted herein are those which were in effect at the time this appeal was taken and which govern our decision. Thus, 43 CFR § 4.291(b) before its revision provided as follows:

"(b) Service of copies of Notice of Appeal. The appellant shall hand deliver, or forward by certified mail, to the Examiner, the original and one copy of the notice of appeal and any amendment thereto, and in a like manner, one copy of the notice and of any amendment to the Board. It is a *jurisdictional requirement* that, at the time of filing the original notice, he shall forward copies of the notice of appeal by regular mail or otherwise to all Superintendents named on the Examiner's notice of decision, to all parties who share in the estate under the decision being appealed, and to all other parties who have appeared of record. The notice of appeal shall have attached thereto a certificate if filed by an attorney of record, or an affidavit if filed by a non-attorney, setting forth the names of parties served and the last known address of each to whom the notice was mailed. Any amendments to the notice of appeal shall be served on the same parties in like manner, and similar evidence of service must be filed with regard thereto." (Italics supplied)

rights; as we have done, we are constrained to hold that her failure to comply with the regulations in the respects noted is fatal to her right of appeal. Not only does the regulation itself squarely establish it as a jurisdictional requirement that one seeking to appeal must obtain service on the parties specified therein, but, also, this Department has in past decisions consistently adhered to the policy of dismissing appeals for failure to provide timely service on adverse parties. See *Estate of Ellen Fitzpatrick*, IA-T-5 (July 28 1967); *Esther Bosworth and W. E. James*, A-30703 (May 31, 1967); *United States v. Jess A. Thom*, A-30459 (November 17, 1965); and *United States v. Wm. F. and F. M. Keys*, A-29594 (November 20, 1962).

In *Estate of Ellen Fitzpatrick*, *supra*, the strict policy of this Department in requiring compliance with its regulations was particularly underscored. In that case, which was an Indian probate matter arising under an earlier version of the regulations which required service upon the opposing counsel or litigants at the same time service was made upon the Superintendent, the Regional Solicitor held that service of the notice of intention to appeal upon the attorney for the adverse party 11 days after such notice was served upon the Superintendent could not reasonably be construed to constitute service upon him "at the same time" service was made upon the Superintendent.

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Because this appeal must be dismissed for the reason that the service of the notice of appeal did not meet the requirements of the regulations, it is unnecessary to discuss or comment upon other contentions or matters raised in the appeal. We have, however, reviewed the record and find that the decision of the Secretary is fully substantiated by the facts of this case and that there are no compelling reasons ascertainable from the record herein for us to depart from the usual strict rule of compliance with Departmental regulations.⁹

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the appeal of Lena L. Crispino is denied and the Decision After Rehearing entered by the Secretary of the Interior on June 29, 1971, is affirmed. This decision is final for the Department.

MICHAEL A. LASHER, *Member*.

I CONCUR:

DANIEL HARRIS, *Member*.

⁹ In this latter connection, it should be noted that appellant was specifically advised in the Secretary's decision and the Notice accompanying the same of the necessity of complying with Part 4 of Title 43 CFR appearing in 36 F.R. 7186 (April 15, 1971), a copy of which was served on appellant together with the notice and the decision, and in particular, of the necessity of complying with 43 CFR § 4.291 appearing therein.

February 18, 1972

HUSKY OIL COMPANY OF DELAWARE DEPCO, INC.

5 IBLA 7

Decided February 18, 1972

Appeal from decision (M 15508) by Montana state office, Bureau of Land Management, holding oil and gas lease terminated for failure to pay rental timely.

Reversed and remanded.

Oil and Gas Leases: Rentals

Where a producing oil and gas lease is partially committed to a unit agreement and the segregated uncommitted lands do not contain a well capable of producing oil or gas in paying quantities, the segregated lease is subject to payment of annual rental on or before the anniversary date of the lease. Where the lessee is not informed of approval of the unit agreement and segregation of the uncommitted lands into a new lease effective April 1, 1970, and the lessee did not receive notice until some five weeks thereafter of such actions and subsequent to anniversary date of the lease, May 1, 1970, the segregated lease is not automatically terminated under 30 U.S.C. sec. 188 (1970), for failure to pay the annual rental on or before the anniversary date of the lease.

Oil and Gas Leases: Known Geologic Structure—Oil and Gas Leases: Rentals

Notice given in 1967 that an oil and gas lease is subject to increased rental because of inclusion of some of its lands in a known geologic structure of a producing oil or gas field is considered to be ade-

quate notice that a lease segregated therefrom in 1970, containing some lands on such known geologic structure, is also subject to payment of the increased rental.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination—Statutory Construction: Generally

Congress intended that the automatic termination provision of 30 U.S.C. sec. 188 (1970), apply to the regular, annual rental payment, the necessity for which a lessee had continuous notice and that provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued.

APPEARANCES: Donald L. Jensen and James S. Holmberg for appellants.

Opinion by Mr. Fishman

**INTERIOR BOARD OF
LAND APPEALS**

Husky Oil Company of Delaware and Depco, Inc., have appealed to the Director, Bureau of Land Management,¹ in which the Bureau's land office at Billings, Montana, held that oil and gas lease M 15508 had terminated effective May 1, 1970, because the rental for the lease year commencing on that date had not been timely paid.

A noncompetitive oil and gas lease, Montana 073179, issued effective May 1, 1966, for 1,999.36 acres. Notice of increase in rental rate for lease M 073179 was given by land office decision of December 4, 1967, which also described 320 acres of the

leasehold which had been determined to be within the known geologic structure of Bell Creek Field. On February 19, 1968, a producing oil well was completed in SW $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 1, T. 8 S., R. 54 E., P.M., Montana, within the leasehold thereby changing the status of the lease from one subject to payment of annual rental in advance to one subject to payment of royalty rental at the end of the lease year. The land office decision of September 18, 1968, notified the lessees that the Bell Creek Field known geologic structure had been expanded to include an additional 120 acres in the lease. The Bell Creek "A" unit agreement, 14-08-0001-11760, was approved effective April 1, 1970.² Only 440 acres of lease M 073179 was committed to this unit agreement. The land office decision of May 6, 1970, gave notice that the segregated lands, containing 1,559.36 acres, were now identified as lease M 15508 effective as of April 1, 1970. 30 U.S.C. sec. 226(j) (1970). This was the first notice to the lessees that the Bell Creek "A" unit agreement had been approved. Lease M 15508 had no well capable of producing oil or gas in paying quantities. Therefore, such lease was subject to payment of annual rental in advance. 43 CFR

¹ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Cir. 2273, 35 F.R. 10009, 10012.

² The U.S. Geological Survey approved the Bell Creek "A" unit agreement on March 31, 1970, but under the terms of the agreement, the unit operator was permitted to select the effective date of the unit agreement after he had complied with certain requirements of the State of Montana. On April 22, 1970, the unit operator advised the Regional Oil & Gas Supervisor, Geological Survey, that the effective date of the Bell Creek "A" unit agreement was 7 a.m., April 1, 1970.

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3103.3-2(a) (1972). Since the segregation of lease M 15508 from lease M 073179 was made effective April 1, 1970, rental for the lease year commencing May 1, 1970, at the rate of \$2 per acre, was due and payable on or before that date. When it was ascertained that no rental had been paid timely for the lease, the land office decision of May 22, 1970, held that the lease had terminated pursuant to 30 U.S.C. sec. 188 (1970). Rental in the amount of \$2 per acre was paid with the notice of appeal.

The appellants contend that the segregation of lease M 15508 from lease Montana 073179 was effective by the decision of May 6, 1970, and even though the effective date of M 15508 was recited in that decision to be April 1, 1970, in fact the original lease M 073179 was a single subsisting lease on May 6, 1970. They contend they were entitled to proper and timely notice of the rental requirement, since there had been a change in the status of the segregated lease from one which permitted payment of minimum royalty at the conclusion of the lease year to one which required payment of annual rental in advance. They cite *Roy M. Eidal, Kern County Land Co.*, A-29300 (February 19, 1962); *C. W. Trainor*, 69 I.D. 81 (1962); and *Transco Gas and Oil Corporation*, A-28363 (August 2, 1960), as support for their argument that the automatic termination provisions of the law do not apply in the absence of notice that the lease has been changed from royalty to rental status.

In *Eidal*, rescission of a land office approval of a partial assignment of a noncompetitive oil and gas lease after commencement of a lease year left a lease without a well capable of production of oil or gas in paying quantities and so subject to payment of annual rental in advance. The Department held that the lease did not become subject to termination under 30 U.S.C. sec. 188 on a retroactive basis, saying:

To so hold would be to place the lessee in an impossible situation and to demand of him that he meet the requirements of a statute from which he is explicitly exempted on the supposition that some later action of the Department might deprive him of the protection afforded by the statute. If a lessee is not obligated to pay the annual rental on the day it would normally fall due, the automatic termination provisions of the statute do not apply to his lease. If it is later determined that the well which protected the lease ought not have been part of it, the lessee is obligated to pay the rental due, but only after he has been notified of the changed circumstances and the rental demanded of him. See *Transco Gas & Oil Corp.*, A-28363 (August 2, 1960) and Solicitor's Opinion, 64 I.D. 333 (1957).

Transco relates to the failure of a lessee of an oil and gas lease to pay the 7th lease year rental in advance when it had not been informed that its application for extension of the lease beyond the initial 5-year term had been approved. The Department held that the automatic termination provision of 30 U.S.C. sec. 188 (1958) did not apply in such a situation.

The Solicitor's Opinion holds that Congress intended that the automatic termination provision of 30 U.S.C. sec. 188 (1970) to apply to the regular, annual rental payment, the necessity for which a lessee had continuous notice and that provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued. The opinion further recited that such a view is consonant with a salient principle of law that this Department has been scrupulous to follow, and that is that no one should be deprived of his rights without adequate notice.

Trainer relates to leases segregated by partial assignment from a lease issued December 1, 1948, and which had been granted extensions of 2 years from October 1, 1958. Rentals for the 12th lease year had been paid on a pro-rated basis for 10 months, December 1, 1959, to September 30, 1960. On September 29, 1960, the first producing well was completed within the original leasehold so that each segregated lease was entitled to a further extension of 2 years from that date. 30 U.S.C. sec. 187a (1970). The land office held that the segregated leases terminated October 1, 1960, because additional rental had not been paid in advance. The Department reversed, holding that the automatic termination provisions of 30 U.S.C. sec. 188 (1958) do not apply in a situation where, due to other contingencies, additional rental may become due on a date other than the anniversary date of the lease.

The present situation is not directly analogous to any of the cited cases, but the rationale of those cases and that opinion is controlling. In the case at bar, where no notice of the date of approval of the unit agreement was given to the appellants prior to the anniversary date of their lease, and the identification (by number) of the segregated lease was not disclosed, both of which actions together would have afforded the appellants the opportunity to make rental payment with proper identification on or before the anniversary date of the lease, the land office erred in holding that the lease terminated pursuant to 30 U.S.C. sec. 188 (1970). The appellants cannot be held to be obligated retroactively to pay rental for the segregated lease on the date it would normally fall due, and the automatic termination provisions of the law do not apply. We hold that payment of the rental due for the lease year commencing May 1, 1970, for lease M 15508 made June 18, 1970, after notice of segregation of lease M 15508 from lease M 073179 had been given, was timely, and that lease M 15508 did not terminate.

The argument of the appellants that no notice had been given that lease M 15508 was subject to increased rental because some of the lands therein have been determined to be within the known geologic structure of a producing oil or gas field is not persuasive. Notices of increased rental for lease Montana 073179 had been given on Decem-

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ber 4, 1967, and on September 18, 1968, with the description of the lands within the known geologic structure set forth in each notice. The notice of segregation of lease M 15508 from lease Montana 073179 likewise set forth the description of the lands in each lease. We consider that the lessees were given timely and adequate notices that the lands in lease M 15508 were subject to the increased rental.

In view of the result reached in this decision, the request for oral argument is denied since it would serve no useful purpose.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the case is remanded to the Bureau of Land Management for further appropriate action not inconsistent herewith.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

NEWTON FRISHBERG, *Chairman*.

**HUSKY OIL COMPANY OF
DELAWARE
DEPCO, INC.**

5 IBLA 16

Decided February 18, 1972

Appeal from decision (M 15502) by Montana state office, Bureau of Land Management, holding oil and

gas lease terminated for failure to pay rental timely.

Reversed and remanded.

Oil and Gas Leases: Rentals

The failure to pay annual rental on or before the anniversary date for an oil and gas lease, segregated from a producing lease because of partial commitment to an approved unit agreement effective at 7 a.m. on that anniversary date, does not cause the segregated lease to terminate by operation of law under 30 U.S.C. sec. 188 (1970).

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination—Statutory Construction: Generally

Congress intended that the automatic termination provision of 30 U.S.C. sec. 188 (1970), apply to the regular annual rental payment, the necessity for which a lessee had continuous notice. That provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued.

APPEARANCES: Donald L. Jensen for appellants, Husky Oil Company of Delaware, Inc. and Depco, Inc.; James S. Holmberg for Samuel Gary, et al.

Opinion By Mr. Fishman

**INTERIOR BOARD OF
LAND APPEALS**

Husky Oil Company of Delaware and Depco, Inc., have appealed¹ to the Director, Bureau of Land Management,² from a decision dated

¹Samuel Gary, Robert T. Birdsong, Fla Lewis, Jr., Exeter Drilling and Exploration Company and R. G. Boekel, all having interests in oil and gas lease, M 15502, also filed a joint appeal.

²The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, on July 1, 1970, to the Board of Land Appeals, effective that date. Circular 2273, 35 F.R. 10009, 10012.

June 18, 1970, in which the Bureau's Montana state office held that oil and gas lease M 15502 had terminated effective April 1, 1970, because rental had not been timely paid for the lease year commencing on that date. 30 U.S.C. sec. 188(b) (1970).

The facts are these: noncompetitive oil and gas lease Montana 021711 was issued effective April 1, 1956, for 2,121.80 acres. This lease was extended to March 31, 1966, pursuant to 43 CFR 3127.1(a) (1961) (now 43 CFR 3107.1-1(a) (1972)),³ further extended to February 29, 1968, by partial assignment of 40 acres, pursuant to 43 CFR 3128.5(a) (1966) (now 43 CFR 3107.6-1 (1972)),⁴ and further extended to February 28, 1970, by drilling operations pursuant to 43 CFR 3127.2 (1968) (now 43 CFR 3107.2 (1972)).⁵ Notice of increase in rental rate was served by decision of December 4, 1967, which described 400 acres within the leasehold as having been determined to be within the known geologic structure of Bell Creek Field. A producing well was completed within the leasehold of Montana 021711 in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 11, T. 8 S., R. 54 E.,

P.M., on January 14, 1970. On March 1, 1970, lease Montana 021711 became a lease extended by production. Effective 7 a.m., April 1, 1970, 80 acres of lease Montana 021711 were committed to Bell Creek "A" unit agreement, 14-08-0001-11706, approved by the Geological Survey March 31, 1970. The land office decision of May 4, 1970, gave notice of the segregation of the uncommitted 2,001.80 acres of Montana 021711 into a new lease, M 15502, effective April 1, 1970. When it was ascertained that no rental had been paid on or before April 1, 1970, for the segregated lease M 15502, the land office decision of June 18, 1970, held lease M 15502 to have terminated effective April 1, 1970, since the lease had no well capable of producing oil or gas in paying quantities.

The Bell Lake "A" unit agreement was not effective at the commencement of April 1, 1970, but at 7 a.m. on that date, so that lease Montana 021711 was a lease containing 2,081.80 acres and held by production when its lease year commenced April 1, 1970. The segregation of the uncommitted lands did not occur until 7 a.m., April 1, 1970, after the lease year had commenced. Therefore the segregated lease M 15502 was not in effect until that time. Accordingly the state office erred in applying retroactively the termination provision of 30 U.S.C. sec. 188 (1970).

³ This regulation relates to the single extension of a 5-year lease issued prior to September 2, 1960, and is based on the Act of August 8, 1946, § 3, 60 Stat. 951.

⁴ This regulation pertains to extensions granted because of segregation by assignment after discovery upon another portion of the original lease and is based on 30 U.S.C. § 187a (1970).

⁵ This regulation is based on 30 U.S.C. § 226(e) (1970).

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Our conclusion is also predicated upon *Solicitor's Opinion*, 64 I.D. 333, 336 (1957), that the automatic termination provision of 30 U.S.C. sec. 188 (1970) was intended by the Congress:

* * * to apply to the regular, annual rental payment, the necessity for which the lessee had continuous notice and * * * was not intended to apply to a case where the lessee had no way of knowing that the obligation had accrued. The *Ingersoll* case * * * [*Donald C. Ingersoll*, 63 I.D. 397, 400 (1956)] * * * recognizes a salient principle of law that this Department has been scrupulous to follow, and that is that no one should be deprived of his rights without adequate notice.

See *Transco Gas and Oil Corp.*, A-28363 (August 2, 1960).

In view of our conclusions no useful purpose would be served by granting the request by some of appellants for oral argument. Accordingly, the request for oral argument is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the case remanded to the Bureau of Land Management for further action not inconsistent herewith.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

NEWTON FRISHBERG, *Chairman*.

STANDARD OIL COMPANY OF CALIFORNIA AND ATLANTIC RICHFIELD COMPANY

5 IBLA 26

Decided February 22, 1972

Appeal from decision (Anch.-028404 and Anch.-028407) by Alaska state office, Bureau of Land Management, giving notice of increased oil and gas lease rental rate.

Reversed.

Administrative Practice—Courts—Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit, the leased lands are situated in whole or in part on the known geologic structure of a producing oil or gas field, and the lease terms and factual circumstances are identical to those in the decision, *Standard Oil Company of California et al.*, 76 I.D. 271 (1969), this Department will follow the ruling by the United States Court of Appeals for the Ninth Circuit in *Standard Oil Company of California v. Morton*, 450 F.2d 493 (1971), which overturned that decision solely upon principles of contract construction; therefore, the eliminated lands will retain the rental rate applicable to nonparticipating acreage within the unit rather than the higher rate applicable to non-unitized lands within a known geologic structure.

Standard Oil Company of California et al., 76 I.D. 271 (1969), no longer followed.

APPEARANCES: D. G. Couvillon, Vice President, Standard Oil Company of California, Western Operations, Inc.; Gordon Davis, Attorney in Fact, Atlantic Richfield Company.

Opinion By Mrs. Thompson

INTERIOR BOARD OF LAND APPEALS

Standard Oil Company of California and Atlantic Richfield Company have jointly appealed to this Board from a decision dated December 18, 1970, by the Alaska state office of the Bureau of Land Management at Anchorage, affecting their oil and gas leases Anch.-028404 and Anch.-028407. Their appeal relates only to that part of the decision which provided that there would be an increased rental rate beginning September 1, 1971, for the acreage in the leases which

was eliminated, effective July 1, 1970, from the Birch Hill Unit Agreement No. 14-08-0001-8693.

The decision of the Alaska state office gave notice that certain lands in these and other leases not involved in this appeal were eliminated from the Birch Hill Unit, and that the lands in these leases are located partially within and partially outside the contracted boundary of the unit. The decision stated that the eliminated portion of each lease and the portion which remains unitized continue to form one lease which is extended by production, either actual or constructive. (This is due to production within the unit.) The decision indicated that the records of the Geological Survey show the acreage in these leases to be distributed into three categories as follows:

	(1)	(2)	(3)	Total
Anchorage	Acres in participating area	Acres outside participating area but within unit	Acres outside unit but partially within KGS	
028404	530	190	1,360	2,080
028407	400	80	2,073	2,553

The decision held that rentals for these categories, as numbered above, are as follows:

(1) The acreage within the participating area of the unit is on a minimum royalty basis.

(2) The acreage outside the participating area but within the unit is 25 cents per acre or fraction thereof in accordance with regulation 43 CFR 3103.3-2(a)(2) and rental provision sec. 2(d)(1)(a) (iv) of the lease terms.

(3) Acreage outside the unit but partially within a known geological structure (KGS)¹ would be increased to \$1, the rental rate for leased lands wholly or partially within a KGS of a producing oil or gas field, applicable to leases issued prior to the Mineral Leasing Act Revision of September 2, 1960 (30 U.S.C. sec. 181 *et seq.* (1970)),

¹ For brevity purposes "KGS" will hereafter be used for the term "known geologic structure."

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and not subsequently extended pursuant to section 4(a) of that Act (30 U.S.C. sec. 226-1 (1970)),² beginning with the first lease year after 30 days' notice that a portion of the lease is on a KGS.

Portions of each of these leases are within the KGS of the Birch Hill Field.

The appeal concerns only the rental rate in the third category, the land which was eliminated from the unit. Before the contraction of the unit, all the lease acreage outside the participating area of the unit was subject to the rental rate of 25 cents per acre or fraction thereof. The question raised by this appeal is whether the acreage eliminated from the unit remains subject to the 25 cent rate applicable to nonparticipating acreage within a unit, or must be increased to the \$1 rate which would be applicable to non-unitized leases which lie wholly or partially within a KGS.

The factual circumstances of this case are identical to those considered by this Department in *Standard Oil Company of California et al.*, 76 I.D. 271 (1969), except, as the leases in this case issued prior to July 3, 1958, the lease rental rate of 25 cents for lands not on a KGS is applicable, whereas, in that case, the leases issued after that date. The rental rate for such lands in those leases was changed to 50 cents pursuant to section 10 of the Act of

July 3, 1958, 30 U.S.C. sec. 251 (1964), which made the rental rate for lands in Alaska not on a KGS identical to that in the other states.

In *Standard*, *supra*, this Department held that the rental rate for lands within a KGS was applicable to lands eliminated from a unit which were situated in whole or in part on a KGS, where only a portion of the lands in a unitized oil and gas lease was so eliminated, rather than the rate for unitized land not included in a participating area.

Appellants contend that the KGS rental rate should not apply to the lands eliminated from the unit and rely upon the court decision, *Standard Oil Company of California v. Hickel*, 317 F. Supp. 1192 (D. Alaska 1970), which overruled the Department's determination above as to the rental rate for the lands eliminated from the unit. The court granted a judgment declaring that the correct rental for such lands is the rate prescribed for the nonparticipating lands in the unit, *i.e.*, 50 cents per acre (which would be 25 cents per acre in the present case as discussed above). The district court's decision was affirmed in a *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit, *Standard Oil Company of California v. Morton, et al.*, 450 F.2d 493 (9th Cir. 1971). This affirmance has now become final. As the Court of Appeals stated at 495:

² Both leases issued effective September 1, 1956, and have been extended under other statutory provisions which do not change the rental terms of the lease, as does section 4(a).

Had the entire acreage under each of these leases been contracted out of the

cooperative unit, it is clear that the \$1.00 per acre rental would be applicable. The district judge concluded, however, that the draftsman of the federal lease had not made provision for the possibility that only part of the acreage under a lease would be affected by contraction while the lease itself would remain pledged to the approved unit development. He charged the Secretary as draftsman of the lease with the confusion resulting from this oversight and ambiguity. Under the general rules of contract construction, he construed the leases against the draftsman and his agents. *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188, 45 S.Ct. 469, 69 L.Ed. 907 (1925); *Reconstruction Finance Corp. v. Sullivan Mining Co.*, 230 F.2d 247, 250 (9th Cir. 1956).

The Court of Appeals affirmed for the reasons set out in the district court's opinion.

The courts' decisions leave the anomalous result that leases completely eliminated from a unit but within a KGS will be subject to the KGS rental rate, but if the lease is only partially eliminated from the unit, although within a KGS, the eliminated lands are not subject to the higher KGS rental even though they are no longer bound to the unit agreement provisions. These provisions justify the lower rental for land subject to the agreement which are not within the participating area. The court decisions, however, relied solely upon principles of contract construction and concluded that the gap and ambiguity in the lease terms should be resolved against the United States as drafter of the lease instrument. There is, therefore, nothing in the court decisions which conflicts with

the following statement in the Departmental decision in *Standard*:

* * * We see nothing in the statute which would preclude the Secretary from providing by regulation or by lease terms for a different rental rate between non-participating acreage within a unit and acreage eliminated from a unit. (76 I.D. 277).

We understand that existing regulations and the lease form will be revised to cure the gap and ambiguity in the lease terms.

The provisions of the lease and the regulations in the cases now before us, however, are the same as those considered in the *Standard* decisions mentioned above.³ The

³ The lease terms as to rental and minimum royalty are as follows:

"Rentals.—To pay the lessor in advance an annual rental at the following rates:

(a) If the lands are wholly outside the known geologic structure of a producing oil or gas field:

(i) For the first lease year, a rental of 50 cents per acre or fraction thereof, or if the lands are in Alaska, 25 cents per acre or fraction thereof.

(ii) For the second and third lease years, no rental.

(iii) For the fourth and fifth years, 25 cents per acre or fraction thereof.

(iv) For the sixth and each succeeding year, 50 cents per acre or fraction thereof, or if the lands are in Alaska, 25 cents per acre or fraction thereof.

(b) If the lands are wholly or partly within the known geologic structure of a producing oil or gas field:

(i) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands leased, \$1 per acre or fraction thereof.

(ii) If this lease is committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, the rental prescribed for the respective lease years in subparagraph (a) of this section, shall apply to the acreage not within a participating area, except that the rental for the second and third lease years for

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lands involved here are in the same judicial district and circuit. There are no factual differences which could afford a basis for distinguishing the *Standard* court decisions from the present case. There is no doubt that any further court litigation would reach the same result.

We are compelled, therefore, to conclude that the courts' interpretation of the lease terms in *Standard* as to the rental rate for lands eliminated from the unit will control this Department's determination of such rental rate in this case and other cases where the lease terms and factual circumstances are identical. The Departmental decision in *Standard* will no longer be followed in such circumstances, and the decision below must be reversed insofar as it required the KGS rental for the lands eliminated from the unit where part or all of the lands are within a KGS, rather than the rental rate applicable to the unitized nonparticipating acreage. *Of. B. E. Burnaugh*, 67 I.D 366 (1960).

such acreage shall be 25 cents per acre or fraction thereof.

Minimum royalty.—Commencing with the lease year beginning on or after a discovery on the leased land, to pay the lessor in lieu of rental, a minimum royalty of \$1 per acre or fraction thereof at the expiration of each lease year, or the difference between the actual royalty paid during the year if less than \$1 per acre, and the prescribed minimum royalty of \$1 per acre, provided that if this lease is unitized, the minimum royalty shall be payable only on the participating acreage and rental shall be payable on the nonparticipating acreage as provided in subparagraph (b) (ii) above."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed to the extent indicated above, and the case is remanded to the Bureau for appropriate action.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

UNITED STATES v. NEIL STEWART

5 IBLA 39

Decided February 28, 1972

Appeal from decision (Nevada Con- tests 3332, 3333 and 3361) by Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, holding mining claims null and void and rejecting mineral patent applications.

Affirmed.

Mining Claims: Common Varieties of Minerals: Unique Property

The fact that a deposit of otherwise common sand and gravel may be located in an area where assertedly sand and gravel is scarce does not make it an "uncommon variety", since scarcity is not a unique property inherent in the deposit but is only an extrinsic factor.

Mining Claims: Discovery: Marketability

The Government may raise a presumption that the material on the claim could not be extracted and marketed at a profit by introducing evidence that claimant has done nothing toward the development of the claim.

Mining Claims: Discovery: Marketability—Mining Claims: Common Varieties of Minerals: Generally

In order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit.

Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve for a prospective market does not impart validity to the claim.

Rules of Practice: Generally—Rules of Practice: Government Contests—Rules of Practice: Supervisory Authority of Secretary

Where the Secretary assumed jurisdiction of a mining claim contest by directing that the hearing examiner forward a recommended decision directly to the Department level, the Secretary was not bound by such directive to decide the case and it was not a violation of due process to return the case to the Director of the Bureau of Land Management to render the initial decision under the then prevailing adjudicative procedure.

Administrative Procedure: Decisions

The Administrative Procedure Act, 5 U.S.C. sec. 557(c) (A), does not require that an initial decision must incorporate a ruling on each finding and conclusion

made in the recommended decision of the hearing examiner but rather it is sufficient if the initial decision contains a statement of its findings, conclusions, and the reasons or basis therefor.

APPEARANCES: Thomas L. Steffen for the appellant; Otto Aho, Field Solicitor, Department of the Interior for the appellee.

Opinion by Mr. Fishman

**INTERIOR BOARD OF
LAND APPEALS**

Neil Stewart has appealed to the Secretary of the Interior¹ from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated March 18, 1970, which declared null and void his four placer mining claims.

This proceeding was initiated by contest complaints issued by the acting manager of the Nevada land office wherein the following allegations were made:

With regard to the Crocus No. 10, the Orellette No. 3, and the Dragonfly No. 9 claims: The land embraced within the claims is nonmineral in character, and no discovery of valuable minerals has been made within the limits of the claims because it has not been shown that the mineral materials present could have been marketed at a profit prior to the act of July 23, 1955. Also, with regard to the Crocus No. 10 and the Orellette No. 3 claims: The amended locations of these claims were not made in good faith.

With regard to the Olinda claim: Minerals have not been found within the lim-

¹ The Board of Land Appeals has been delegated the authority of the Secretary in deciding appeals to the head of the Department from decisions rendered by Departmental officials relating to public lands. 211 DM 13.5; 35 F.R. 12081.

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its of the claim in sufficient quantity and quality to constitute a valid discovery and no discovery of a valuable mineral has been made within the limits of the claim because it has not been shown that the mineral materials present could have been marketed at a profit prior to the segregation of the land from mining entry.²

The contestee answered denying these allegations and a hearing was held on July 15 and 16, 1964.

For purposes of expediting the resolution of this particular case, the Assistant Secretary of the Interior directed that the hearing examiner prepare only a recommended decision which was to be forwarded directly to the Departmental level for review and final administrative action by the Department.

The hearing examiner's recommended decision was issued on May 12, 1965. He found that the factors necessary to sustain a valid discovery of a valuable mineral de-

posit were complied with prior to July 23, 1955, as to all claims in issue and that the record was devoid of any evidence that the amended locations were not made in good faith. The recommended decision together with the contest file, transcript of hearing and exhibits were forwarded to the Under Secretary of the Interior on May 26, 1965.

On June 2, 1969, the Assistant Secretary, Public Land Management, returned the case to the Director, Bureau of Land Management to render an initial decision. The Bureau decision, rendered on March 19, 1970, reversed the recommended decision of the trial examiner and found that the contestee did not meet the requirements for the discovery of a valuable mineral deposit prior to July 23, 1955, and that the claims were invalid. Since this finding was dispositive of the case, the Bureau decision did not determine whether the so-called amended locations of the Crocus No. 10 and Orlette No. 3 claims were made in good faith or whether the small tract classification regulations issued by the Department effected the segregation of the lands from mining location.

The four claims are located approximately 11 miles from the center of the city of Las Vegas. The Orlette No. 3 was originally located on September 10, 1953, on the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 29 by Peter A. Schenone and John R. Osborne; however, an amended notice of location by the locators, dated February 28, 1961, described the claim as

²The latter charge with respect to the Olinda claim relates to the possible segregation from mining location of all of the area embraced in the Olinda claim by virtue of Nevada Small Tract Classification Order No. 85 of September 4, 1953, for purposes of disposal under the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. § 682a (1970). By regulation, 43 CFR 257.3(b), adopted January 15, 1955, 20 F.R. 366 (now 43 CFR 2731.2(b) (1971)) "Lands classified under the act of June 1, 1938, as amended, will be segregated from all appropriations, including locations under the mining laws. * * *". Hence, it would appear that the appellant must show a discovery of valuable mineral before January 15, 1955, if he is to establish the validity of his claim. Cf. *Buch v. Morton*, 449 F.2d 600 (9th Cir. 1971). However, this decision will treat July 23, 1955, as the crucial date, its being the date that common varieties of minerals were removed from the ambit of the United States mining laws. 30 U.S.C. § 611 (1970). See *United States v. Neil Stewart et al.*, 1 IBLA 161 (December 9, 1970).

covering the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 29. The Crocus No. 10 was located originally as the Crocus No. 1 by Everett Foster and De Esta Foster on May 8, 1951, on the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 29, but an amended notice of location by the locators, dated March 13, 1961, changed the name to Crocus No. 10 and the land description to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 20.³ The Dragonfly No. 9 was located by Richard B. Borders and Phyllis M. Borders on April 29, 1953, on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 29, and the Olinda placer mining claim was located by Arthur Woolley and Ivy Woolley on April 21, 1952, on the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 29. All of the claims are in T. 22 S., R. 61 E., M.D.M., Nevada.

The claims were deeded to Neil Stewart in 1961. The parties stipulated that the possessory title to the four claims is now vested in Neil Stewart, who holds title to the claims for the Stewart Brothers Company, a partnership consisting of Neil Stewart, Harold Stewart, Gerald Stewart, and Alden Stewart.

The claims were located for, and are being held for, sand and gravel deposits. The facts concerning the material on the claims, its physical properties and composition, the purposes for which the material could be used, the improvements found upon the claims, and the extent of

the deposit are not in dispute. The suitability of the material for all phases of the normal and general uses for which sand and gravel are used in the Las Vegas area was the subject of testimony by the expert witnesses for both parties. The material has no distinct or special mineralogical properties that distinguish it from other sand and gravel deposits in the Las Vegas area, and it cannot be used for purposes over and above the normal and general uses for which said sand and gravel are used for fill material, for class 1 and 2 roadbase material, and for asphalt aggregates. On this basis the Bureau decision found that the material on the claims is a common variety of mineral material and falls within the purview of section 3 of the Act of July 23, 1955, 30 U.S.C. sec. 611 (1970), which prohibited as of the date of the Act further location of mining claims for common varieties of sand, gravel, *inter alia*.

Although the appellant concedes that the sand and gravel on his claim does not have any unique property giving the material a special value for any of the uses for which sand and gravel are used, it is appellant's position that the sand and gravel on his claim is not a "common variety" of sand and gravel within the meaning of 30 U.S.C. sec. 611 (1970).⁴ Appellant argues that by virtue of the limited supply of sand and gravel in the Las

³ These so-called "amendments" involving the establishment of the claims on lands not previously involved would appear to be actual relocations or locations of new claims. As they were made after location of claims for sand and gravel was prohibited by statute, it would appear that they are null and void *ab initio*. However, our decision is premised on different grounds.

⁴ "Common Varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *." 30 U.S.C. § 611 (1970).

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Vegas area the sand and gravel on his claim is thereby rendered "unique." We disagree.

The appellant relies on the testimony of the Bureau's witness, Edward Hollingsworth, that the available reserves of sand and gravel in the Las Vegas area, which were suitable for construction purposes, were in a crucial state in 1955 (Tr. 111), but the evidence does not in any way show that the actual supply of sand and gravel was limited in relation to the demand prior to July 23, 1955. The appellant, who is engaged in the sand and gravel business, testified that he had approximately 1,200 acres of sand and gravel claims to a minimum depth of five feet (Tr. 259). He also stated that gravel was plentiful in the Las Vegas Valley area prior to 1955 (Tr. 257) and that two or three of his competitors had good reserve deposits and sand and gravel even as of the time of the hearing (Tr. 251).

Even if the available supply of sand and gravel in the Las Vegas area, suitable for construction purposes was scarce prior to July 23, 1955, this would not satisfy the Department's criterion for an "uncommon variety" of sand and gravel. The Department interprets the 1955 Act as requiring two criteria to meet the definition of "uncommon variety" of sand and gravel: (1) That the deposit have a unique property and (2) that the unique property give the deposit a distinct and special value. *United States v. Bedrock Mining Co.*, 1 IBLA 21 (Septem-

ber 23, 1970); *United States v. Frank and Wanita Melluzzo*, 76 I.D. 160 (1969); *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127, 134 (1968). Only if the material has a unique property is it necessary to consider the second criterion. *McClarty v. Secretary of Interior*, 408 F.2d 907 (9th Cir. 1969).

The Department has rejected the situs of a mineral deposit as a factor in determining whether or not a deposit of sand and gravel is an uncommon variety. See *United States v. Frank and Wanita Melluzzo*, *supra*; *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968). As we stated in *Melluzzo*: [at 76 I.D. 168]

The act of July 23, 1955, *supra*, states that "common varieties" do not include deposits of sand, gravel, etc., which are valuable "because the deposit has some property giving it a distinct and special value" (Italics added). This suggests that a special physical property must inhere in the deposit itself and that factors extrinsic to the deposit are not to be determinative. * * *

We think that the same reasoning is applicable to a contention that a sand and gravel deposit is "unique" by virtue of the scarcity of sand and gravel in the area. We therefore find that the material on the appellant's claims is a "common variety" of sand and gravel within the meaning of 30 U.S.C. sec. 611 (1970).

Appellant contends that the decision of the Bureau that he did not discover a valuable mineral deposit

within the meaning of 30 U.S.C. sec. 22 (1970) is contrary to the weight of the evidence.

In order to determine whether a claimant has discovered a valuable mineral deposit at any point in time within the meaning of 30 U.S.C. sec. 22 (1970) the Department has traditionally employed, with judicial approval, the prudent man test. A discovery exists:

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894); see *United States v. Coleman*, 390 U.S. 599 (1968).

In the case of a widespread non-metallic mineral the Department, again with judicial approval, requires that a critical factor to be considered in applying the above test is whether or not the claimed material is "presently marketable," that is, whether the mineral in question can be extracted, removed, and marketed at a profit. See *United States v. Coleman*, *supra*. In order to meet this marketability test the contestee must show that:

* * * by reason of accessibility, *bona fides* in development, proximity to market, *existence of present demand*, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. (Italics supplied).

Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959) citing *Layman v.*

Ellis, 54 I.D. 294, 296 (1933).⁵ See *United States v. William A. McCall*, 2 IBLA 64, 78 I.D. 71 (1971).

Since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. sec. 611 (1970), it must be shown that all the requirements for a valid discovery of a sand and gravel deposit existed as of that date, including a showing that the mineral from the deposit could have been extracted, removed, and marketed at a profit by July 23, 1955. See *United States v. Barrows*, 404 F. 2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969); *Palmer v. Dredge Corp.*, 398 F. 2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *United States v. Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971).

The marketability test has been held to be specifically applicable in determining the validity of sand and gravel claims in the Las Vegas area. See *Palmer v. Dredge Corp.*, *supra*; *Osborne v. Hammit*, Civil No. 414 (D. Nev., August 19, 1964).

The contestee has the ultimate burden of proving (the risk of non-persuasion) that he fulfills the requirements of the above tests and that his claim is therefore valid, but the contestant is required to intro-

⁵ *Foster v. Seaton* gives an incorrect citation for *Layman v. Ellis*. The correct citation is 52 L.D. 714 (1929). The 54 I.D. 294 is the citation for *Solicitor's Opinion* which refers to *Layman v. Ellis*. However, the quote is from the *Solicitor's Opinion*.

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duce sufficient evidence to establish a *prima facie* case that no discovery has been made. See *Foster v. Seaton*, *supra*.

The appellant asserts that the contestant failed to prove its *prima facie* case of a lack of a discovery. We agree with the Bureau's decision that the testimony of the government's witness, Edward Hollingsworth, was sufficient evidence to establish a *prima facie* case that the appellant did not discover a valuable mineral deposit prior to July 23, 1955.

Hollingsworth, a Bureau of Land Management engineer, testified that he examined all of the contested claims in 1958 and saw no evidence of any removal of material from the claims (Tr. 23) and no evidence that any exploratory tests were conducted on the claims to determine the exact nature of the deposit as to quantity and quality (Tr. 79, 80).

An actual history of development of a claim prior to July 23, 1955, is not essential in order to meet the requirement of marketability. See *United States v. Clark County Gravel, Rock, and Concrete Co.*, A-31025 (March 27, 1970); *United States v. Warren E. Wurts and James E. Harmon*, 76 I.D. 6 (1969); *United States v. E. A. Barrows and Esther Barrows*, 76 I.D. 299 (1969), *aff'd*, 447 F.2d 80 (9th Cir. 1971). On this basis, appellant asserts that a lack of removal of material from his claims, in and of itself, is not sufficient to establish the contestant's *prima facie* case.

As we pointed out in *United States v. E. A. Barrows*, *supra* at 306:

* * * [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), affirmed in *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States v. Alfred N. Verrue*, *supra*. [75 I.D. 300 (1968).]

In view of this presumption and the testimony of Edward Hollingsworth establishing the above presumption, we believe that the contestant introduced sufficient evidence to establish a *prima facie* case that the material on the claims could not have been marketed at a profit prior to July 23, 1955.

The appellant argues that the contestant may not rely upon the testimony of Edward Hollingsworth to prove its *prima facie* case because his original recommendation to the Bureau of Land Management that a discovery had not been made was based upon his erroneous belief that the locators of the claims were not connected with the sand and gravel industry whereas upon his later recognition that the appellant had an established sand and gravel business he changed his recommendation and found that in view of this fact the contestee had met the tests for a valid discovery.

The opinions or conclusions of a witness do not determine whether the contestant has met its burden of establishing a *prima facie* case. If evidence has been introduced during the course of the hearing which is sufficient to raise a presumption that the contestee is lacking one of the necessary elements of discovery, *i.e.*, marketability, then the contestee has the burden of overcoming that evidence. Moreover, the determination of the validity of a mining claim cannot rest upon the identity and business of the claim owner.

The appellant argues that the facts preponderate in favor of a valid discovery when subjected to the prudent man and marketability tests. We agree with the Bureau's finding that the contestee's evidence is too vague and inconclusive to show that the materials from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955.

The claims were not actually deeded to Neil Stewart until 1961. On direct examination the appellant testified that prior to 1953 or 1954 he had a verbal lease with the locators of the four claims with an option to buy the claims and that around 1953 or 1954 written agreements were executed (Tr. 218). On cross-examination, however, Mr. Stewart testified that he did not exactly recall when his oral lease with the original locators began (Tr. 259) or whether he paid the lessors any money under the terms of the leases. He could not produce the

written agreements or could not recall the year the written agreements were executed (Tr. 262).

Vern Mendenhall, a road contractor, testified that he removed approximately 50,000 yards of sand and gravel from the Olinda claim around 1953 and that he had a written lease with Everett Foster before he removed any of the material (Tr. 137). On cross-examination Mendenhall stated that he was not certain of the year he removed the material from the Olinda claim. The Government introduced a written lease between Everett Foster and the Ideal Asphalt Paving Company, Mendenhall's company, dated August 8, 1956, covering the Olinda placer mining claim among others (Ex. 21). Appellant admitted that his lease with the locators of the Olinda claim could have been a year after the execution of the Foster-Ideal Asphalt Paving Company lease (Tr. 264).

We find that the appellant's evidence is insufficient to establish that the material from his claims could have been marketed at a profit prior to July 23, 1955. The appellant has failed to prove the existence of a demand for the material as of that date *from these claims*. See *United States v. William A. McCall, Sr. et al.*, *supra*.

The appellant was unable to present any evidence that he removed any material from the claims, other than for assessment work, prior to 1955. He admitted in his testimony that if he removed any material from the four claims for marketing

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at a profit it was in relation to his operations after 1956 (Tr. 280).

He seeks to explain the absence of a *bona fide* development of his claims by arguing that since he operated an established sand and gravel business, as a prudent businessman he was entitled to hold sand and gravel reserves without development in order to meet a prospective market based upon a reasonable belief in the continued development of the Las Vegas area which would insure a demand for sand and gravel.

The Department has already held that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. *United States v. William A. McCall and R. J. Kaltenborn*, 1 IBLA 115 (November 25, 1970); *United States v. Fisher Contracting Co.*, A-28779 (August 21, 1962); *United States v. Joseph Schelden*, A-29078 (April 26, 1963) and that a prospective market is not sufficient to establish the validity of a claim as of the date when a discovery was required to be shown. *United States v. William M. Hinde*, A-30634 (July 9, 1968).

The record is devoid of sufficient evidence that the sand and gravel from the appellant's claims could have been mined, removed, and marketed at a profit prior to July 23, 1955.

Edward Hollingsworth testified that there was a market for the sand and gravel from appellant's claims prior to 1955 (Tr. 105, 113), but he

also testified that these deposits were "a little bit beyond the fringe of an economic deposit" (Tr. 99). Hollingsworth testified that the amount of *reserves* left in the Las Vegas valley was very limited as early as 1955 (Tr. 111), but this does not mean that there was a limited *supply* of sand and gravel relative to the demand at that time. Appellant freely acknowledges that he intended to hold the claims as reserves (Brief to the Board p. 15). The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including a showing of marketability on or before July 23, 1955. Vern Mendenhall testified that he removed and marketed at a profit 50,000 yards of sand and gravel from the appellant's claims but he was unable to say that this was prior to 1955.

Appellant testified that he removed sand and gravel from each of the claims and marketed this material at a profit (Tr. 245) but presented no testimony that such material was marketed at a profit prior to July 23, 1955, or even that it could have been marketed at a profit prior to that date. He admitted that despite some transactions in sand and gravel prior to July 23, 1955, gravel was plentiful in the Las Vegas area and there was free and easy access to gravel often from "community" pits without paying money for it (Tr. 257). Ap-

pellant also testified that he acquired these claims since they were ideally located for a readily foreseeable market in the southern part of the Valley-Strip area, the McCarran Field area, and the Paradise Valley area (Tr. 226). There was no evidence presented, however, that there was a market for sand and gravel from the claims in issue in these areas prior to July 23, 1955. Appellant did testify that he removed material from a state pit three-quarters of a mile from the contested claims and that such material was removed at a profit, but again it was not shown that this removal was prior to July 23, 1955.

Appellant relies on the fact that his claims compare more favorably than another placer claim in the Las Vegas area which was deemed to be a valid discovery. A discovery on one claim does not inure to the benefit of another. *United States v. William A. McCall*, *supra*; *United States v. J. R. Osborne*, 77 I.D. 83 (1970); *United States v. Charles H. Henrikson*, 70 I.D. 212 (1963), *aff'd*, *Henrikson v. Udall*, 229 F. Supp. 510 (D. Cal. 1964), *aff'd*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 380 U.S. 940 (1966).

As we stated in *United States v. Clear Gravel Enterprises*, *supra*, at 294:

The lack of proof of sales from the claims as of July 23, 1955, although not completely decisive as to the issue of marketability, suggests that certain factors must have been involved that prevented the sale; i.e., it is indicative that

the materials on the claims could not have been extracted, removed, and marketed at a profit as of that date. *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), *aff'd*, *Foster v. Seaton*, *supra*.

The appellant's evidence has failed to overcome the presumption that the sand and gravel on his claims could not be marketed at a profit.

The appellant raises two procedural grounds in urging that the Bureau decision be reversed.

First, the appellant contends that the Department was bound by the requirements of due process to follow the review procedure directed by the Assistant Secretary which provided that the recommended decision of the examiner would be forwarded directly to the Departmental level for a final decision within the Department. The appellant argues that the assumption of jurisdiction of the case by the Bureau of Land Management was prejudicial to him in that he was denied his right to have an expeditious determination of the case at the Departmental level without the detrimental effect of a reversal of the examiner's recommended decision by the Bureau. To support his argument appellant relies on the principle that an agency is bound to follow its own rules and regulations, citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Pacific Molasses Co. v. FTC*, 356 F.2d 386 (5th Cir. 1966).

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Neither the principle of administrative law stated by the appellant nor the cases cited in support thereof are applicable to this case since the directive issued by the Assistant Secretary cannot be equated to the published rules or regulations of an administrative body. The effective Departmental regulations provided that the Director of the Bureau of Land Management could require the examiner to render a recommended decision and the Director could then make the initial decision in the case. 43 CFR 1852.3-8 (1964). Although the Secretary delegated this authority to the Director, he did not divest himself of the power to exercise that authority. The Secretary therefore decided to exercise his discretion to assume jurisdiction of the case, but it cannot be said that he was bound by that decision as an agency is bound by its rules and regulations. Clearly, the Secretary had the discretion to return the case to the Director for an initial decision.

The case thus proceeded in accordance with the prescribed regulations of the Department and therefore appellant's claim of prejudice due to an unfavorable decision by the Director is not valid. As to any delay caused by the return of the case to the Director, the appellant has not demonstrated how this was prejudicial to his case.

The appellant claims that the decision of the Bureau should be re-

versed because that decision failed to make or enter findings or rulings of each exception taken to the hearing examiner's recommended decision. Specifically, appellant asserts that the hearing examiner found that it was undisputed that the sand and gravel on appellant's claim could have been marketed at a profit prior to July 23, 1955, but the Bureau's finding stated only that "the most that can be said for contestee's evidence is that there was a generalized demand" as of July 23, 1955, and "contestee's evidence is too vague and inconclusive." The appellant claims that these findings are insufficient to meet the requirements of the Administrative Procedure Act which provides that "the record shall show the ruling on each finding, conclusion, or exception presented." 5 U.S.C. sec. 557(c) (1970).

The Administrative Procedure Act, 5 U.S.C. sec. 557(c) (A) (1970), requires that a decision make a ruling on exceptions taken to a recommended or initial decision of an examiner *submitted by a party*. Here, the parties did not file exceptions to the recommended decision of the examiner. It does not necessarily follow that when an initial decision reverses the recommended decision of an examiner that "exceptions" exist, or if so, that the initial decision must incorporate a ruling on each "exception" taken

to the examiner's decision. Rather, we believe in this situation it is sufficient if the decision comports with the requirement of 5 U.S.C. sec. 557(c) (1970) that:

* * * all decisions * * * shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record. * * *

See *American President Lines v. NLRB*, 340 F.2d 490 (9th Cir. 1965); and *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 352 (1969), petition for reconsideration pending.

The decision by the Bureau more than adequately explained the findings, conclusions, and reasons why the examiner's decision was not adopted. The decision summarized the controlling principles of law and the testimony of witnesses relative thereto and explained the reasons why the appellant's evidence was "too vague and inconclusive" to meet the legal test for a valid discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

HAROLD C. ROSENBAUM

5 IBLA 76

Decided March 3, 1972

Appeal from decision (Montana 9426 (SD)) of Montana land office, Bureau of Land Management, rejecting color of title application.

Affirmed.

**Color or Claim of Title: Generally—
Color or Claim of Title: Applications**

A quiet title decree by a state court may not be relied upon by an applicant under the Color of Title Act as giving color of title to support a Class 1 claim where the holding of the land under the decree falls short of the 20-year statutory period required.

Color or Claim of Title: Generally

The mere payment of property taxes assessed by a county is not sufficient, alone, to constitute a holding of land by the taxpayer under a claim or color of title as required by the Color of Title Act.

Color or Claim of Title: Generally

Under the Color of Title Act the requisite holding of land under some claim or color of title is not satisfied because of changes in the movement of a river affecting the riparian land, where the applicant has no basis for believing he had title to the land derived from some source other than the United States.

APPEARANCES: Frank G. Stickney for appellant.

Opinion By Mrs. Thompson

INTERIOR BOARD OF
LAND APPEALS

Harold C. Rosenbaum has appealed from a May 4, 1970, decision

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of the Billings, Montana, land office, Bureau of Land Management, rejecting his application filed June 11, 1968, under the Color of Title Act of December 22, 1928, *as amended*, 43 U.S.C. sec. 1068 (1970).¹

The application was for the E $\frac{1}{2}$ SW $\frac{1}{4}$, also described as lot 2 and NE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 33, T. 90 N., R. 49 W., 5th P.M., Union County, South Dakota, containing 80 acres. In his application, Rosenbaum stated that he has been in open, notorious, and peaceful possession of the land for more than 25 years; that he has paid real property taxes on the property since 1941, when Union County placed the property on its tax rolls; and that in 1958 the Circuit Court for Union County, South Dakota, awarded him a judgment in a quiet title action.² The application also stated there were estimated improvements worth \$2,500, and that 6 acres had been cultivated in 1945, with the cultivation increasing gradually to 80 acres in 1968.

In the processing of his application, the land office sent a letter to Rosenbaum on May 5, 1969, requesting information as to how he acquired the land, and indicating that the mere squatting on public land does not give rights against the

United States and that the quiet title judgment did not purport to quiet title as against the United States.

In reply, Rosenbaum's attorney said that Rosenbaum "entered" the property in good faith and commenced paying taxes on it. He asserted that this land was submerged under the Missouri River in the early 1920's and as the river flowed to the south in the 1930's, the land started to be "made back," and he began to pay taxes on it, to clear it, and to make improvements.

On May 28, 1969, the Bureau made a second request to Rosenbaum's attorney of record for information as to the time he entered the land and the basis on which he asserts ownership. No reply was made to this inquiry.

The land office then issued its decision of May 4, 1970, stating the requested information had not been filed. The decision held that assertion and ownership by occupancy and use of public domain do not alone qualify an individual under a color of title claim, but that there must be some document purporting to convey title.

Appellant's present attorney asserts that the Bureau's letter of May 28, 1969, was never received by appellant's attorney of record then, and that is the reason the requested information was not submitted. Appellant's first attorney has since become a judge. Because this appeal attempts to supply the requested information and to respond to the Bureau's decision, we need only decide

¹ The Color of Title Act is hereafter referred to as "The Act."

² A copy of the judgment accompanied the application. The judgment stated the plaintiff had "actual, open and adverse possession" of this property plus the W $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$, in the same section, for more than 20 years immediately preceding the commencement of the action. The judgment declared the plaintiff to be the owner in fee simple of the real property and quieted title in him.

whether the information shows that the requirements of the Act have been met.

For a Class 2 claim, the Act and the regulations require payment of taxes for "the period commencing not later than January 1, 1901, to the date of application", 43 U.S.C. sec. 1068; 43 CFR 2540.0-5(b) (1971). From the appeal it is apparent that a class 2 color of title claim could not be sustained here as the property was not taxed and taxes were not paid prior to 1941 or 1942.

For a Class 1 claim, it must be shown that the property has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, that valuable improvements have been made, or that some part of the land has been reduced to cultivation. *Id.* The action taken below did not question the facts as to improvements or cultivation, but whether possession of the land was based upon a holding under a claim or color of title for more than 20 years.

In this appeal many arguments have been advanced for the proposition that the judgment in the quiet title action brought by appellant constitutes a valid color of title instrument. The difficulty with claiming color of title by virtue of that judgment, however, lies in the fact the judgment was rendered in 1958. In his application, appellant stated he learned he did not have

clear title to the land in 1968. Even assuming, therefore, that there was a holding under color of title under the judgment, that 10-year holding falls short of the prescribed statutory 20-year period. Thus, the decree may not be relied on as establishing the requisite claim or color of title.

In explaining his claim to the land prior to the judgment, appellant states that apparently the land had been under water many years ago and after it emerged the county taxed it to him. His attorney indicates in this appeal:

*** Mr. Rosenbaum's claimed title did not, as far as I can determine originate from a prior conveyance. It is a question of intent as to why he originally claimed it. The county saying he owned it and taxing him for it was probably the controlling factor, this being exclusive of the South Dakota statute so providing, which was, I imagine, why the county made this determination. Harold Rosenbaum is not the "shrewd Schemer" type. He is easy going and accepts things, and when the county told him it was his, even though there wasn't much usefulness to it at this point, he apparently accepted that as no one else was claiming it. As I understand it, it wasn't very desirable property at that time.

It is difficult to say when he "entered upon" the property. It was like an extension of his river bank, and made in the 1930's. However, I understand that he began clearing and cultivating it about 1945. I believe he physically entered upon the property as the accretion formed. I would say he probably began exercising domain over it and claimed it when the county said it was his, around 1942, and taxes [sic] him for it, but did nothing with it until 1945. He then reduced the whole thing to cultivation and improved it.

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Appellant contends that his occupancy of the land and payment of taxes since 1942, alone, should constitute a valid claim of title. Further, he argues it would be inequitable now for the Government to claim the land after he has changed it from a piece of wasteland of little value into a going farm.

From what has been shown by the applicant, the primary basis for his claiming title to the land, other than the quiet title decree, is because the county taxed him for the land and then he used it.

The fact that the county taxed the land and that appellant paid the taxes does not alone establish a claim or color of title to land within the meaning of the Act. In *Beaver v. United States*, 350 F. 2d 4, 9 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966), the court expressed doubt that a state's claim of property for taxes could be one characterized as under "color of title", but held that even if it were, the state or other taxing governmental body would have to meet the requirements of the Act, including "actual, exclusive, continuous, open and notorious possession of the parcel" in order to be deemed as holding the parcel under a claim or color of title. *Id.* at 10. In that case, there had been a tax sale by the governmental body and the claimants were claiming through such a sale. In this case, however, all that has been shown is that the county taxed the property, not that it asserted any claim to the land as owner. It is apparent from the Act

itself, that Congress required more than the mere payment of taxes since it prescribed the Class 2 type of claim where payment of taxes had to be made from a period beginning from January, 1, 1901, to the date of the application. The Act also requires that the land be held in good faith under a claim or color of title. If payment of taxes alone were sufficient, there would have been no reason for Congress to have specified that the land be held under a claim or color of title.

Although this Department has recognized that production of receipted tax bills may constitute corroborative evidence under a Class 1 claim to support an assertion that the land has been held in good faith, *Ben S. Miller*, 55 I.D. 73 (1934), never has the mere payment of taxes alone been held sufficient to constitute a holding under a claim or color of title.

In *Clarence C. and Frank R. Day*, A-30454 (March 9, 1966), involving an application to purchase land as a Class 2 claim under the Act, the applicants had proved payment of taxes since 1889. On appeal, rejection of the application was affirmed because appellant had failed to show the required color of title since 1901. Appellants could trace the title only through 1927 when one Booth conveyed the title to the applicants' father, a predecessor in interest. Concerning the payment of taxes, in the absence of a document of title, the Assistant Solicitor stated:

The United States cannot infer that Booth held this land under color of title

in absence of an actual document of title, whatever the reason for its absence may be, * * * the mere payment of taxes on this land is insufficient to overcome the absence of such a document.

As this quotation demonstrates, generally it has been held that a document must be offered as evidence to show that the applicant had cause to believe that he had title to the land. See also *Nina R. B. Levinson and Clare R. Sigfrid*, 1 IBLA 252, 254, 78 I.D. 30, 32 (1971).

Thus, it has been held that mere occupancy of public land and acts of improvement upon the land alone do not constitute a holding of the land under claim or color of title. *Thomas Ormachea*, A-30092 (May 8, 1964). As stated in *Hugh Manning*, A-28383 (August 18, 1960):

* * * [T]he act was never intended to operate as a means of obtaining patent by mere occupation of public land under a pretense of title or claim where the claimant had no good reason to believe he had good title.

Also, a showing only of clearing and cultivating the land is not sufficient. *Marion M. Pontius*, A-27473 (November 7, 1957). Title to a portion of the public domain cannot be acquired under the Act without the existence of a sound basis for believing that occupation was by right. *Id.*

The only other basis for a belief that he had a valid claim or color of title to the land, alleged by appellant, pertains to the movement of the river. Although it has been stated that the land in question was submerged by the Missouri River

and that it was "made back" or that accretions were added to the river bank, we have no corroborated information of the facts concerning the movement of the river affecting this land and other land owned by appellant. We do not know whether the land in question was ever completely eroded away and covered by water or whether any accretions may have attached to government land or land belonging to the applicant. In any event, such determinations are unnecessary here. If the appellant claims the land by virtue of the doctrines of erosion, accretion or reliction, this would imply that the United States has no title to convey as the applicant already holds title by operation of law. Therefore, there would be no basis for the United States to convey what it does not have. If the changes in the movement of the river did not under the law affect the ownership of the land, or the United States regained land lost by erosion, then appellant was a mere occupier of public land and would have no basis for believing he had title to the land derived from some source other than the United States. He would thus "lack the basic element of a color of title claim; i.e., possession under some claim or color of title derived from a source other than the United States." *Bernard J. and Myrle A. Gaffney*, A-30327 (October 28, 1965).³ Cf. *William F. Trachte*, A-

³ A suit for judicial review of the *Gaffney* decision resulted in a stipulated dismissal without prejudice, January 17, 1969. *Bernard J. Gaffney and Myrle A. Gaffney v. Stewart Udall*, Civil No. 3-66-22 (D. Minn.).

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30291 (June 8, 1965); *Myrtle A. Freer et al.*, 70 I.D. 145 (1963).

As to the allegation concerning equities, we need only note that this Department's authority to dispose of public land is circumscribed by the acts of Congress and cannot go beyond those bounds. Since it has not been shown that the requirements of the Color of Title Act have been met, the application must be rejected. *Id.*

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member.*

I CONCUR:

MARTIN RITVO, *Member.*

I CONCUR IN THE RESULT:

FREDERICK FISHMAN, *Member.*

UNITED STATES *v.* HENRIETTA
BUNKOWSKI AND ANDREW
JULIUS BUNKOWSKI

5 IBLA 102

Decided March 7, 1972

Appeal from decision (Nevada Contest Nos. 062289, 062290, 062291) of Office of Appeals and Hearings, Bureau of Land Manage-

ment, setting aside in part a decision holding mining claims invalid and remanding the case for a new hearing.

Affirmed as Modified.

Mining Claims: Generally—Mining Claims: Common Varieties of Minerals: Generally

A deposit of gypsite, composed of particles of gypsum mixed with impurities such as clay and silica, utilized in agriculture for the gypsum it contains by applying it to alkali soils as a soil conditioner is a locatable mineral under the mining laws.

Mining Claims: Hearings—Rules of Practice: Hearings

A stipulation by a field solicitor at a hearing that the statutory requisites for the grant of a patent have been met does not preclude consideration in a further proceeding of any question vital to the determination of whether the requirements of the law have been met.

Mining Claims: Contests—Mining Claims: Determination of Validity

To establish a *prima facie* case and to meet its burden of proof, in a mining contest, the government is not required to negate all the proofs of discovery. The government can meet its burden by competent testimony that there has been no discovery of a valuable mineral deposit.

Mining Claims: Determination of Validity

Where a mineral claimant has located a group of claims he must show a discovery on each claim, which requires a showing that the mineral from each claim could have been extracted, removed and marketed at a profit.

Mining Claims: Contests

Where the Government mineral examiner conducted his examination of contested claims under a misapprehension that the mineral deposit on the claims was not locatable, the case will be remanded so that a proper examination of the claims may be made.

Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

If it is shown as to a number of claims located for gypsite, and for which applications for patent have been filed, that the amount of deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid from which production would most feasibly meet the market demand and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery.

Mining Claims: Discovery: Generally

To prove that a discovery of a valuable mineral deposit has been made under the mining laws it is not necessary to show there is an actual profitable mining operation in existence; instead there must be evidence of the quantity and quality of the mineral deposit within the claim which under known marketing conditions could be sold at a price which would justify reasonably expected costs of a mining operation so that a prudent man would expect to develop a valuable mine.

Mineral Lands: Determination of Character of—Mining Claims: Mineral Lands

To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character of the land may be established by inference without the exposure of the

mineral deposit for which the land is supposed to be valuable.

Mineral Lands: Determination of Character of—Mining Claims: Mineral Lands

Since geological inference may be used in establishing the mineral character of lands within a claim and such inferences can arise from proof of discovery on the claim, it is advisable not to dispose of the issue of mineral character before deciding the issue of discovery.

APPEARANCES: David Sinai (Sinai and Sinai) for the appellant; Otto Aho, Field Solicitor, U.S. Department of the Interior, for the United States

Opinion By Mr. Ritvo

INTERIOR BOARD OF LAND APPEALS

Henrietta and Andrew Julius Bunkowski have appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated August 4, 1969. The decision set aside a decision of a hearing examiner dated October 4, 1968, holding invalid seven mining claims held by appellants for which they had filed mineral patent applications. The decision also remanded the case to the hearing examiner for a new hearing to develop more definite evidence of the quality, quantity, and extent of any presently marketable gypsite on the contest claims. Finally, the decision held that the evidence was clear and unequivocal that there is no gypsite on the north half of one claim, the Enterprize, that that portion of the

March 7, 1972

claim was nonmineral in character, and that the claim was null and void as to that portion.

Of the claims involved in this case, the Enterprize is located in sec. 2, T. 15 N., R. 20 E., M.D.M., Ormsby County, Nevada, while the War Bond, Gypsite, and Gypsite Extensions 1-4 are situated in secs. 25, 31 and 36, T. 16 N., R. 20 E., M.D.M., Lyon County, Nevada.

Six of the claims were located in the years 1945, 1947, and 1949. The Enterprize claim was located in 1960. The appellants did not locate all the claims themselves; some were acquired by purchase. The claims are alleged to contain valuable mineral deposits of gypsite. The gypsite is spread upon alkali soils of local farms in order to improve their capacity to produce crops (Tr. 40).¹ The appellants located or purchased the claims in order to acquire all available gypsite deposits in their vicinity, to develop the gypsite and to stabilize the price. Between the years 1949 and 1967, the appellants developed all the claims and actually sold gypsite from all but Gypsite No. 2, Extension (Tr. 104). Through the years the amount of appellants' sales has varied from 3,281 tons sold in 1952 to 190 tons in 1966. Andrew Bunkowski, testified that between 1949 and the first nine months of 1967, the gross receipts from sales of gyp-

site were \$176,920, with a net profit of \$121,000. In the highest year (1952) the sales amounted to \$22,046. In the lowest entire year (1966), the sales were \$1,365. In the first nine months of 1967, the last year of record, production and sales were slightly higher than the previous year (Tr. 106-108).

On March 12, 1964, the contestees applied to the Bureau of Land Management for a mineral patent for the contested claims. The United States filed a contest to these claims on November 4, 1967, charging that there had not been a discovery of a valuable mineral deposit within the lands of the claims and that lands were nonmineral in character. The contest was heard by a hearing examiner. At the hearing the government sought to establish that gypsite was not a locatable mineral and therefore could not be the basis of a valuable mineral discovery necessary for a patent. On October 4, 1968, the hearing examiner issued a decision holding that gypsite was not a locatable mineral and voiding the claims. On appeal, the Office of Appeals and Hearings, Bureau of Land Management, overruled the hearing examiner and remanded the case for a new hearing in order to take evidence as to the quantity, quality, and extent of the gypsite on the contested claims. A portion of the Enterprize claim, the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2, T. 15 N., R. 20 E., M.D.M., was excluded from reconsideration since it was found that the evidence was clear and unequiv-

¹ This and similar references are to the pages of the transcript or to the exhibits (Ex.) submitted at the hearing held on September 27, 1967.

ocal that no valuable deposits of gypsite were contained on this portion of the claim.

On appeal to the Secretary, the appellants assert that the patent should issue without further hearing and present several arguments to support their contentions of error. These may be summarized as follows:

1. The opinion of the Office of Appeals and Hearings was in error in that it excluded a portion of the Enterprize claim from consideration before the issue of a mineral discovery was resolved.

2. The opinion of the Office of Appeals and Hearings was in error in that it considered evidence beyond the question of gypsite's locatability when it was bound by the Field Solicitor's admission that the claims were valid as to all issues other than the locatability of the gypsite deposits.

3. The opinion of the Office of Appeals and Hearings was in error for not finding that the Government failed to sustain its burden of proof and that consequently the appellants' patent applications should be granted.

4. The opinion of the Office of Appeals and Hearings was in error for failing to find that the facts and the law sustained the appellants' discovery.

The first issue is whether gypsite used as this deposit is only for agricultural purposes as a soil conditioner, by being spread on farm land to make it more productive, is a locatable mineral within the meaning

of the mining law. 30 U.S.C. sec. 21 *et seq.* (1970).²

Gypsum is defined as: "Hydrous calcium sulphate, $\text{CaSO}_4 + 2\text{H}_2\text{O}$. Contains 32.5 percent lime, 46.6 percent sulphur trioxide, and 20.9 percent water." United States Bureau of Mines Bulletin, No. 95, "A Glossary of the Mining and Mineral Industry" (1947).

It is used commercially for the manufacture of wallboard and plaster of paris.¹

Gypsite is defined as: "An incoherent mass of very small gypsum crystals or particles * * * containing various impurities, generally silica and clay." *Ibid.*

The gypsite from these claims is sold only for the treatment of alkali soils.

The hearing examiner held that gypsum, like limestone,³ is locatable under the mining laws only if it is of chemical or metallurgical grade. Gypsite, again like limestone, which does not meet minimum specifications for use in trade or manufacturing pursuits, but is used only for agricultural and other purposes, he said, may be disposed of only under the Materials Disposal Act.⁴ He concluded that the gypsite on the claims "even with selective mining methods, does not meet the mini-

² Although the Bureau held that gypsite was a locatable mineral and the contestees did not appeal from this finding, the Secretary of the Interior or his delegate on appeal may inquire into any question vital to the determination of the validity of a claim. *United States v. Clare Williamson*, 75 I.D. 338, 342, 343 (1968).

³ 30 U.S.C. §§ 601, 611 (1970), 43 CFR sec. 3711.1(b).

⁴ 30 U.S.C. § 601 (1970).

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num requirements of gypsum for use in trade or manufacturing pursuits" and that low grade gypsite is not locatable under the mining laws.

On appeal, the Bureau pointed out that the Department had treated gypsite suitable for use as a soil conditioner as a locatable mineral. *United States v. G. C. (Tom) Mulhern*, A-27746 (January 19, 1959). Although there was not an analysis of why gypsite is locatable, it was assumed that, since gypsum is a locatable mineral, gypsite as a form of gypsum is also locatable.

The objections to considering gypsite as a locatable mineral are that it is an impure form of gypsum, that it may be a "common variety," and that its use is in agriculture.

Gypsum has long been recognized as a locatable mineral. *Johnson v. California Lustral Co.*, 59 P. 595 (Sup. Ct. Calif. 1899); *United States v. Albert B. Bartlett et al.*, 2 IBLA 274, 78 I.D. 173 (1971); *United States v. C. E. Strauss et al.*, 59 I.D. 129, 138 (1945). Gypsite, as we have seen, consists of crystals or particles of gypsum intermingled with other substances, usually silica or clay. That a mineral occurs in a deposit of less than optimal purity does not of itself render it nonlocatable. If in that condition it can meet the test for discovery, it remains locatable. *United States v. Howard S. McKenzie*, 4 IBLA 97, 108 (November 19, 1971).

The hearing examiner also adverted to the fact that the Act of July 23, 1955, 30 U.S.C. sec. 611 (1970), removed deposits of certain previously locatable minerals from the category of valuable mineral deposits within the meaning of the mining laws and made them subject to disposition under the Materials Disposal Act (*supra*).

Since all the claims except the Enterprize were located prior to July 23, 1955, the issue would be not whether the gypsite is a "common variety", but whether it was a locatable mineral and if so, whether a discovery was made prior to July 23, 1955, and maintained thereafter. However, if the gypsite deposit is still locatable under the mining laws, the date of location is immaterial.

As to whether gypsite is a "common variety", we note that the Act of July 23, 1955, does not apply to common varieties of all minerals but only to those enumerated, namely, "sand, stone, gravel, pumice, or cinders." As the Department has stated:

* * * Some of these terms, e.g., sand, gravel, and stone, are broad in meaning and can encompass a wide range of materials. The term "stone," in particular, is extremely broad in meaning, including material of igneous, sedimentary, or metamorphic origin and material of variegated mineral composition, ranging, for example, from white limestone to dark basalt. This being the case, it is important not to confuse the material with the constituent elements that make it up. That is, in determining whether a par-

ticular material falls within the purview of the common varieties provision, it is necessary to determine whether the material as a totality has value or whether only a constituent element of the material has value.

United States v. Harold Ladd Pierce, 75 I.D. 270, 279 (1968).

If the material is located only for the value of a constituent element of the sand, gravel, or stone, the question is not whether the deposit is a "common variety" but whether there is a valuable deposit of the constituent element on the claim. *Id.* at 280, 281. Since the material here is valued and used only for its constituent gypsum, it is not necessary to determine whether the deposit is an uncommon variety of sand, gravel or stone. The validity of the claim may be based upon the discovery of gypsum.

The final objection to the deposit rests upon the premise that materials used, as this gypsite is, for horticultural purposes are not locatable under the mining laws. The Government contended that, since materials such as blow sand, some clays, sand and gravel used only for filling purposes are not minerals subject to location and that blow sand and decomposed granite suitable only for fill or as soil conditioners are not subject to entry under the mining laws,⁵ gypsite used only for agricultural purposes as a soil conditioner or soil amendment is similarly nonlocatable.

The Bureau's decision discussed this issue thoroughly. It said:

Richard O. Gifford, a soils expert and professor of soil science at the University of Nevada, testified for the contestees and stated that he received sixteen samples of gypsite from Mr. Bunkowski on which he made essential qualitative examinations to evaluate their suitability as a soil amendment. He found that the sodium ion content was low, the calcium carbonate content was considerable, and that they were definitely calcareous in reaction to acid. He said that the primary purpose of gypsite is to alter the relative abundance of calcium and sodium ions with the colloidal complex of the soil, that the minimal nutrition of the plant is affected by the ratio of calcium to sodium, and that the nutrition of the plant is affected beneficially through the application of gypsite to alkaline soils. It is a chemical as well as physical amendment of the soil condition. In accepted general usage there is fertilizer and soil conditioner and nothing else, but there is actually a third category—soil amendments—which are chemical compounds to change the chemical environment of the plant root, to make materials more available to the plant although not necessarily supplying those materials. One of the difficulties with a highly alkaline soil is the unavailability of iron. However, one need not add any iron to correct this situation, as gypsite or gypsum will in some part serve this purpose. He explained how gypsum actually chemically works on the soil, as follows:

"* * * the colloidal complex of the soil consists primarily of an inorganic silicate base whose crystal structure is unbalanced internally and is balanced on the surface by ions more or less in solution. When the predominance of these ions is sodium, in effect, when 15 percent or more of the ions associated with the clay or sodium, the soil, physical conditions and chemical environment for plant growth deteriorates.

⁵ *Holman v. State of Utah*, 41 L.D. 314 (1912); Solicitor's Opinion, M-36295 (August 1, 1955); *United States v. Abe Jaramillo*, A-28533 (February 6, 1961).

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[sic] The function of the calcium sulphate is to provide sufficient soluble calcium in the soil so that the sodium is released from the clay, and I should add, this is an essential step, that sodium might then be removed from the soil by leaching with water, so the addition of the calcium sulphate alone is not sufficient. The sodium must be removed by leaching." (Tr. 124-125)

Mr. Gifford defined gypsum to be a chemical amendment to the soil rather than a soil conditioner, although under the State law of Nevada it is not defined as a soil amendment but as an agricultural mineral. He said that common sand, blow sand or decomposed granite do not constitute soil conditioners in any practical sense because they would require the addition of 200,000 pounds of material per acre; that they act as a physical change in the soil when added in sufficient quantities but do not constitute a chemical amendment. The gypsum on the claims constitutes a valuable mineral for use in amending alkaline soils in the Nevada area.

* * * * *

The unrefuted testimony is to the effect that gypsum causes a chemical reaction on alkaline soils thus making them more productive. It is a chemical as well as a physical amendment of the soil condition, whereas blow sand, decomposed granite and decomposed rhyolite merely change the soil physically when added in sufficient quantities. They merely flocculate the soil and make it more friable; in other words, they loosen the soil and allow greater penetration of irrigation water.

Gypsum has a definite chemical formula while blow sand, decomposed granite and decomposed rhyolite do not. They are igneous rocks and more or less inert. In *United States v. E. V. Storey et al.*, Idaho contest 010171 (August 17, 1960), the Director, in holding the decomposed rhyolite deposit on the claims to be a non-locatable mineral, stated:

"The evidence shows that the rhyolite from the claims is an inert rock which, when crushed and added to soil, serves to make the soil more friable; it is also used as a base in some fertilizers. But used for these purposes it is but a common fill material serving no greater purpose than common sand and a host of other materials; * * *

"The material from these claims is not shown to be unusual or exceptional in nature nor different in chemical composition from other igneous rock. It has no qualities that it does not share with other similar deposits and its use is limited for agriculture merely as an additive, similarly as myriad other materials, to increase the friability of soil. Consequently, we find that the material is not a mineral subject to location under the mining laws, nor is the land in which it is found, because of it, mineral in character. * * *

The inference that we draw from the above statements is that if the material had some different chemical composition from similar materials that improve soils, other than to increase their friability and serve as fill material, it might be considered a locatable mineral.

We agree with the Bureau's reasoning and its conclusion that the gypsum on the claims is not non-locatable merely because it is used in agriculture to improve alkali soils.

Before we consider the substantive issues of this case, it is best to consider some preliminary procedural matters raised by the appellants. The first is whether the decision below should have excluded from reconsideration the quarter-section on the Enterprize claim. For reasons stated later, we find

that the decision to exclude this portion of the claim was premature.

The second preliminary consideration is the appellants' apparent contention that it was improper for the Office of Appeals and Hearings to go beyond the question of the locatability of gypsite, when the Field Solicitor has made a judicial admission as to the elements of discovery. We disagree with the appellants and find that there was no error on the part of the Office of Appeals and Hearings in considering evidence beyond the question of locatability. The record contains no evidence that the Field Solicitor who presented the case for the United States made an admission that all the requisites of discovery were met by the appellants and that proof of the statutory requirements could be dispensed with. It does appear that the Field Solicitor emphasized locatability as the initial element of a valuable mineral discovery. However, the locatability of the mineral alleged to constitute a valuable mineral deposit is only the first step in determining the validity of the claims.⁶

⁶ At the opening of the hearing, the Field Solicitor stated (Tr. 7-8) :

"Mr. Aho, do you have any opening statement?"

"MR. OTTO AHO: Yes. In order to satisfy the earlier discussion I had with Mr. Sinai, the Government here, of course, is not questioning the manner or the propriety of the location of the claims involved in this proceeding; and secondly, the Government is not questioning or raising any issue concerning the assessment work done on these claims. As the Examiner pointed out, the only issue involved here is the validity of the claims in question. It appears further that the primary issue, if not the sole issue, involved in this

Even if the Field Solicitor had made such an admission, we need not pass upon its effect in this proceedings. The Department has ample authority to refuse to issue a patent and to order further proceedings at any time before patent issues to determine whether the requirements essential to establishing the validity of the claim have been met. *United States v. H. B. Webb*, 1 IBLA 67 (October 15, 1970); *United States v. Eleanor Gray et al.*, A-28710 (Supp. II) (April 6, 1965); *United States v. United States Borax Company*, 58 I.D. 426 (1943).

We now consider the third issue, that the opinion of the Office of Appeals and Hearings was in error for not finding that the Government failed to carry its burden of proof and, consequently, that the appellants are entitled to the patents. We find that appellants, in maintaining this position, misconceive what is meant by the government's burden of proof.

The obligation of the government in maintaining its burden of proof in a land contest was described in *Foster v. Seaton*, 271 F.2d 836 (D.C.

proceeding, is whether or not the material on the claims, namely, gypsite, is a mineral which is or can be located under the mining laws, and it is the Government's prime contention that gypsite is not a mineral within the meaning of the United States Mining Laws and all the claims in question were located prior to 1955—Oh, excuse me. One claim was located after '55, and that was the Enterprise [sic] Claim, in 1960.

"I believe that completes my opening statement before I make an offer of the Government's Exhibits. Do you wish to make any statement at all?"

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Cir., 1959). *Foster* maintained that in land contests the government must initially establish a *prima facie* case. *Id.* at 838, *Prima facie* means that the case is completely adequate to support the government's contest of the claim and that no further proof is needed to nullify the claim. See *Ballentine's Law Dictionary* 986 (3d ed. 1969). Of course, the contestee has the opportunity to rebut the government's evidence but the contestee is also obliged to establish his own case and to see that it meets the statutory requirements for a patent. 30 U.S.C. sec. 22 (1970). To meet its burden the government is not required to negate all the evidence required of the patent applicant. *United States v. William D. Pulliam, et al.*, 1 IBLA 143, 145-146 (December 8, 1970); *United States v. Bryan Gould, et al.*, A-30990 (May 7, 1969). Therefore, once the government's witness, Shepard, testified as to the nature and use of the gypsite and stated that in his opinion the mineral gypsite was not a mineral that can be used as a basis for a valuable mineral discovery, Tr. at 39, 42, the government established a *prima facie* case.

We now come to the dispositive issue of this appeal: whether the appellants have made a valuable mineral discovery that would entitle them to a patent under the United States mining laws. 30 U.S.C. sec. 22 (1970). We agree with the decision of the Office of

Appeals and Hearings that the evidence in this case is inconclusive as to whether a valuable mineral discovery has been made. A discussion of the rules of discovery will show the deficient points of the appellants' case.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand.

In addition, there must be a discovery on each claim. The appellants must show *as to each claim* that they have found a mineral deposit which satisfies the prudent

man rule as complemented by the marketability test. *United States v. Frank and Wanita Melluzzo*, 76 I.D. 181, 189 (1969).

The appellants did not offer any testimony as to the amount and nature of the gypsite in each of the claims. They contented themselves with general assertions covering all the claims as a unit. It is not enough to offer evidence simply for the claims as a unit. *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 347-348 (1969).

The Government's examiner, laboring under a misapprehension that gypsite used for agricultural purposes was not a locatable mineral, made a limited examination of the claims. After satisfying himself that there was some gypsite on all the claims, he did not take any samples from five of them (Tr. 22). Before the Secretary disposes of land under the mining law he must be satisfied that the requirements of the law have been met. *United States v. New Jersey Zinc Company*, 74 I.D. 191, 206 (1967). One of the essential elements of the process by which the Secretary reaches his decision is an examination of the claim by Government mineral examiner. For this examination to be useful, the examiner must be apprised of the legal basis on which the examination is made. Now that the issue as to locatability of gypsite has been resolved, the claims should be examined as they would have been if the examiner had been investigating a claim located for a deposit

whose locatability was not in question.

Furthermore there are seven claims involved in the three patent applications. The contestee's witness did not attempt to demonstrate how much gypsite had been removed from each claim, Tr. 103, 104, but restricted himself to testifying as to the annual sales from all the claims combined, except the Gypsite No. 2 Extension which had not been mined. The sales varied from 190 to 3,281 tons a year (Tr. 106-108). The total deposits on the claims another of contestee's witness, stated were at least 325,000 tons of "high grade" deposit (Tr. 154). In addition there are other deposits on patented lands owned by the contestees (Tr. 105, 106).

Thus, the minerals on the claims far exceed the market for them. At the rate at which the contestees have been mining there is enough gypsite on the claims to last 150 years. If the equal amount of low grade deposits is considered, then the deposits on all the claims would satisfy the market for an even longer period of time.

As the Department held in a similar case, *United States v. Robert E. Anderson Jr., et al.*, 74 I.D. 292 (1967), where the deposits of perlite in a group of claims were estimated to satisfy the production that the claimants expected to achieve for 240 years.

If a patent were to issue for all the claims, it is extremely unlikely that the claimants would, or could economically,

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exploit most of them for years to come. The result would be that instead of fostering the development of mineral resources a patent would merely place public lands in private hands and make them no longer available for other disposition or public use.

Essentially the same situation, involving the fact that only some of the mineral deposits could be marketed from claims in an area in which there was a tremendous number of similar deposits, was discussed in a recent case. In affirming a Departmental decision holding certain sand and gravel claims invalid, the court first remarked that there were in excess of 800 sand and gravel claims encompassing 100,000 or more acres in the Las Vegas area and then said:

"If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary ***. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

* * * * *

"* * * Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of *credible* evidence, and the

trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (*supra*) [271 F.2d 836 (D.C. Cir. 1959)] by providing bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely. *Osborne v. Hammitt*, Civil No. 414, United States District Court for the District of Nevada, August 19, 1964."

While contestees' claims cover only 2,300 acres not 100,000, the disproportion between the reserves of perlite on the claims and the market for perlite in the country as a whole, let alone that market in which the contestees could reasonably expect to sell, is similar enough to make the court's observations pertinent and, indeed, controlling.

It is difficult to see how the purposes of the mining laws would be accomplished by patenting all the mining claims, and thus depriving the United States and the public of any other use of the land, when there is no reasonable probability or even possibility that more than a fraction of the deposits could be exploited within the reasonably foreseeable future, even making allowance for the reserves necessary to sustain a mining operation. Justification exists only for holding valid those claims which would supply contestees with the deposits necessary to carry on an operation of the size they contemplate for a reasonable period of time, for in a

hard economic sense only those deposits have a reasonable prospect of a market.

The Department then held valid two claims having estimated reserves sufficient for 30 years of operation and held null and void 14 other claims. *United States v. Robert E. Anderson, Jr., et al., supra.*

Applying the same reasoning to the Bunkowski claims, we would conclude that there is no justification for validating all of the claims, all else being regular. While in the *Anderson* case, *supra*, the testimony established the quality and quantity of the deposits on the claims held valid, there is no evidence in this case as to the specific quality and quantity of the deposits in each of the claims. Thus, on the basis of the present record a determination cannot be made as to how many (if any) of the claims would be required to supply the market that the appellants would reasonably anticipate. The Bureau's decision is modified to include this factor as an item to be considered.

The appellants also allege that the Bureau decision adopts a new rule for discovery by requiring proof of an assured future market as well as a current one. The Bureau applied the regular test as to nonmetallic deposits of widespread occurrence.⁷ Its comments on the possible loss of markets were related more to the quality of the remaining deposits than to the likelihood of a market for gypsite of market-

able grade.⁸ A mineral claimant must establish that the claim contains a valuable mineral deposit for which a market exists. An exhausted deposit or past sales for a mineral which no longer can be sold cannot support a patent application. *United States v. Estate of Alvis F. Denison*, 76 I.D. 233, 253 (1969).⁹ Similarly the concept of a future profitable market is an inextricable aspect of the prudent man rule. The test is whether on the basis of the facts known at the present time a profitable operation might be expected to be developed.¹⁰ Therefore, the size of the present market and its probable continuance are a matter of legitimate inquiry.

For these reasons, then, a further hearing is necessary to develop as to each claim, the quality and quantity of the gypsite deposit, the size of the market in relation to the deposits and which claims, if less than all, are to be patented.

There remains the Bureau's holding that the north half of the Enterprize claim is nonmineral in character and that the claim is null and void to that extent.

Generally the rule is that one valid discovery can support an association placer claim of up to 160 acres. Once the land's mineral character is contested, however, the patent applicant must establish that the

⁸ *Id.* at 14.

⁹ For a full discussion see the *Denison* case, *supra*, at 239-240, *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971).

¹⁰ *Id.*

⁷ Bureau decision at 8.

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area in which no mineral discovery is proved is mineral in character as to each 10-acre tract within the entire claim. If the contestee fails to establish the mineral character of any 10-acre tract, that tract is excluded from the patent. *Crystal Marble Quarries Co. v. Dantice*, 41 L.D. 642 (1913).

The initial question in determining the mineral character of the land is whether there is any evidence that minerals exist on the contested 10-acre tract. The appellants are correct in their statements that proof of that fact can be made through geological inferences, such as proof of a discovery. *State of California v. E. O. Rodeffer*, 75 L.D. 176, 180 (1968); *Central Pacific R.R. v. Mullin*, 52 L.D. 573 (1929). Therefore, to consider the mineral character of a claim prior to consideration of the mineral discovery within the claim could be premature. To dispose of the question of mineral character first and then consider the proof of discovery would deprive the applicant of the full benefit of the inferences to which he is entitled. *Crystal Marble Quarries Co. v. Dantice*, *supra*, at 646; *Central Pacific R.R. v. Mullin*, *supra*, at 575. However, proof that the minerals exist is not sufficient to establish the mineral character of the land for it is the duty of the applicant to further establish that the conditions were such as to reasonably engender the belief that the

land contains minerals in such quantity and quality as to render its extraction profitable and to justify expenditures to that end. *State of California v. E. O. Rodeffer*, *supra*, at 179.

The appellants in this case have not produced any evidence that gypsum exists on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 2, T. 15 N., R. 20 E., M.D.M., other than possible inferences which may be drawn from inconclusive evidence of discovery. Nor have they produced evidence sufficient to show that the minerals that may exist on this tract would be marketable within the meaning of *Rodeffer*. But, we vacate the decision of the Office of Appeals and Hearings as to the exclusion of the above portion of the Enterprize claim, and remand for reconsideration the determination of the mineral character of this portion of the claim along with the reconsideration of the other aspects of the contest so that appellants may have an opportunity to have their case fully reconsidered.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is vacated insofar as it held invalid the north half of the Enterprize claim and affirmed as modified as to the rest, and the case is remanded to the Bureau of Land Management for

further proceedings consistent herewith.

MARTIN RITVO, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*
(concurring separately).

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, CON- CURRING SEPARATELY.

In this case I have been obliged to abandon my initial inclination, which was to regard gypsite which is solely valuable as a "soil amendment" or "conditioner" as non-locatable under the mining law.

Gypsum, a product of relative purity with a broad range of uses and products, quite clearly is locatable. Gypsite, on the other hand, consists of an incoherent mass of very small gypsum crystals or particles heavily mixed with other materials of the earth such as clay, silt, silica, etc. Such gypsiferous material is extremely abundant and widespread.

The separation of the impurities in gypsite in order to obtain gypsum of the purity necessary for the manufacture of gypsum products is economically impractical with the low percentage of gypsum found in gypsite deposits such as those which are the subject of the case.

Other mineral materials which also have no particular use other than as soil additives, nutrients, conditioners or amendments have

been held to be non-locatable. These include decomposed rhyolite, top soil, blow sand and peat. Although these materials may react differently than gypsite (some, perhaps, being even more beneficial), these other materials would seem to be in the same general category as gypsite which is useful only for the improvement of agricultural soils.

The production and use of gypsite involves simply scraping up the material from the claims, hauling it to wherever it is wanted, and spreading it on the ground without processing or beneficiation of any kind. It is merely a matter of redistributing material from where it occurs naturally to someplace where it is desirable to have it returned to the earth. In this aspect gypsite has much in common with a number of other non-locatable mineral materials such as fill dirt, road base and ballast rock. While all of the aforementioned materials may serve beneficial uses and have commercial value, they have never been regarded as locatable minerals. From this standpoint even common brick clay, which the Department has always held to be non-locatable, is a mineral of a higher order than gypsite, since the clay is treated, processed and formed into a manufactured commercial product. The Department has never recognized marketability as the sole test of the validity of a mining claim. *United States v. Mary A. Matthey*, 67 I.D. 63, 65 (1960).

Nevertheless, I am compelled to recognize that these arguments are

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inadequate to contravene the well-reasoned and persuasive rationale of the main opinion. My efforts to buttress my original viewpoint by the citation of strong authority has yielded only the weakest kind of legal support. Accordingly, I must concur in the holding that gypsite is, after all, a mineral subject to location under the general mining law, and I concur in the need for a remand of the case on the issues identified.

APPEAL OF MISHARA CONSTRUCTION COMPANY, INC.

IBCA-869-8-70

Decided March 13, 1972

Appeal from Contract No. 14-17-008-16, Bureau of Commercial Fisheries, Fish and Wildlife Service.

Motion to Dismiss Granted.

Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Generally—Rules of Practice: Appeals: Dismissal

A motion to dismiss will be granted where the record on the motion shows that the Government has been prejudiced by the contractor's delay of at least nine years in presenting notices of claims, or by failing to present to the contracting officer for that period of time data with respect to claims as to which notice was initially given. *Eggers & Higgins v. United States*, 185 Ct. Cl. 765 (1968).

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

In the absence of a contract provision authorizing a contract price adjustment for delay, claims for pay-for-delay are breach of contract claims not within the Board's jurisdiction.

Contracts: Disputes and Remedies: Generally—Contracts: Disputes and Remedies: Appeals—Rules of Practice: Appeals: Dismissal

Where claims presented on appeal by the contractor are in fact claims of subcontractors which, on the record, appear barred as enforceable claims against the contractor by a state statute of limitations, they will be dismissed.

APPEARANCES: For the appellant, Mr. William Kopans, Attorney at Law, Newton Highlands, Massachusetts; for the Government, Mr. Moody R. Tidwell, III, Mr. Charles D. Goldman, Department Counsel, Washington, D.C.

Opinion by Mr. Fonner

**INTERIOR BOARD OF
CONTRACT APPEALS**

On December 27, 1957, appellant was awarded a contract in the estimated amount of \$371,100 for the construction of a fisheries research laboratory building at Woods Hole, Massachusetts, to be completed in 600 days. Notice to proceed was received by appellant on February 6, 1958. Extra work orders, changes and modifications increased the price to \$411,695, and extended the time of performance to December 14, 1959. Under a modification to the contract executed January 18, 1960, the Government took possession, although work was not totally completed until February 26, 1960. The contract was substantially completed on December 15, 1959, result-

ing in the assessment of one day's liquidated damages of \$500.

On March 11, 1960, the Government sent appellant a final payment voucher in the amount of \$20,979.75. The final payment voucher included a release with an exception for claims. In addition, the voucher stated that unless the claims were presented formally within 90 days after receipt of final payment "* * * such claim shall be forfeited and all amounts due under the contract will have been paid in full." (Appeal File Exhibit 18)

The final payment voucher was executed by appellant on June 18, 1969, and returned to the Government. Appellant reserved 21 claims in the amount of "\$65,000.00." (One claim, number 12, was subsequently dropped). The claims were formally presented to the contracting officer on October 27, 1969, within 90 days of receipt by appellant of payment.

In a decision dated July 17, 1970, the contracting officer reviewed the history and noted that Claims 1-11, and 13-19 requested \$57,498.65 and a total of 370 days of time. Claims 20 and 21 each requested one day of time. The decision stated that the contracting officer on April 9, 1970, informed appellant that the information submitted on the claims was not adequate to make determinations on the facts and that additional data should be presented. As of the date of decision, the requested additional data had not been supplied.

The contracting officer then ruled that:

* * * * *

The Contracting Officer has determined that detailed engineering records necessary for the consideration of these claims are not available. It is more than 10 years since the work was completed and as much as 12 years since some of the questions arose. The engineering records would be an absolute necessity for evaluation of the contractor's claims.

* * * * *

The Contracting Officer finds that the Contractor waited an unreasonable length of time before filing the subject claims under Contract No. 14-17-008-16 and that the untimeliness of the claims has prejudiced the Government since it has denied the Contracting officer of the opportunity to determine the facts while engineering personnel were still available to assist and advise him.

The contracting officer did not rule on the merits of any claim. Accordingly, he did not waive the defense of untimely filing resulting in prejudice to the Government. *Eggers & Higgins v. United States*, 185 Ct. Cl. 765, 782 (1968).

This appeal followed and, after several procedural stops and starts, the Government filed a Motion to Dismiss on November 15, 1971. The Government's basic position is that the claims were untimely filed to the resulting prejudice of the Government, citing *Eggers & Higgins v. United States*, 185 Ct. Cl. 765 (1968). The Government asserts that some claims are also for breach of contract. In addition, the Government has raised the issue of applicability of the *Severin* doctrine.

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Each of these positions is discussed below.

Appellant contends basically that the Government was given notice of the claims in 1959 or 1960, and that accordingly *Eggers & Higgins* does not apply.

In *Eggers & Higgins*, the Court of Claims dismissed a petition appealing a denial of a claim by the Veteran's Administration Board of Contract Appeals. The VA Board's position was that the Government had been prejudiced by the plaintiff's long and unreasonable delay in furnishing notice of the claim. The plaintiff had waited five years, until 1965, before presenting a money claim based upon acceleration of performance which must have occurred, if at all, prior to April 1960. It is noteworthy with respect to the present case that in *Eggers & Higgins*, the 1965 acceleration claim was based upon an exchange of correspondence in 1959, wherein plaintiff had requested a two month's time extension, which was turned down by the Government (it is not clear, however, if the denial was in the form of an appealable decision).

As we read *Eggers & Higgins*, the question of whether the delay in giving notice of claim is prejudicial to the Government is an issue of fact, to be decided on the record on the motion. Accordingly, we must examine the factual record on these issues. What notice of the claims, if any, was given to the Government during the course of the project, and

to what extent is the Government prejudiced either by lack of notice or failure to submit claim data prior to 1969.

The evidence before the Board on the motion consists primarily of affidavits and documents, such as letters. We have examined the correspondence contemporary with the job with an eye to two matters (1) is there evidence of notice of a claim, and (2) did the correspondence supply a reasonable basis for contracting officer action. Our observations as to each claim are as follows:

Claim 1, for \$1,131.56, respecting movable office partitions. Letters of April 3, 1959; April 22, 1959; May 20, 1959 and June 5, 1959, all clearly indicate a dispute and an intention to file a formal claim. A request is made to turn the matter over to the contracting officer for determination and finding of fact. The amount involved is not stated.

Claim 2, for \$538.20 and 46 days, respecting a gravel cleat installation on the roof. The letters clearly show a dispute. A letter dated September 4, 1959, asks for 6-calendar weeks of time. In a letter dated September 10, 1959, the regional engineer refused to recommend additional time to the contracting officer. (Interestingly, the documentation of this claim includes a letter dated September 22, 1959, reporting on a conference with the Government at which both appellant and his present counsel of record were present.) On September 25, 1959, a 6-week's time extension was again

requested, as to which the Government, on October 20, 1959, requested more detail. On November 3, 1959, appellant submitted a chronology of correspondence concerning the dispute. In a letter of December 22, 1959, appellant stated "we herewith file a claim for payment for the work" (repair of wind damage to gravel cleat). Nowhere is an amount mentioned of the cost to appellant for the repair.

Claim 3, for \$6,569.77 and 60 days of time for repair of masonry cracks. There appears to be three items of work involved. First, a letter dated October 2, 1958, refers to the intention of appellant to submit a claim and costs for "tooththing" masonry instead of using metal ties. It is not at all clear if this item is pursued even today. Second, a letter dated November 10, 1959 states "We herewith file claim for additional compensation and an extension of time for the additional work involved" in relation to replacement of certain cracked tiles. Neither sum nor number of days are mentioned. Third, a letter dated December 7, 1959, states that appellant expects reimbursement for costs, and a time extension, for repairing certain exterior face brick. No cost data or time data were submitted.

Claim 4, for \$4,221.49 and 30 days, for putting a shop coat of red lead paint on structural steel items such as door and window frames, stairways and handrails to prevent rusting and pitting. Appellant's letter dated November 10, 1959, states that "We * * * herewith file claim

for all costs incurred, and for an extension of time for the additional work involved." Neither cost amount nor time of delay are given.

Claim 5, for \$2,655.89 and 40 days for leveling a concrete floor. Appellant's letter dated December 23, 1959, advises the Government that appellant "* * * herewith file formal claim for all costs incurred in the use of a 'levelling agent.'" No amounts are mentioned.

Claim 6, for \$275.40 for repair of heating system. In a letter dated May 5, 1960, appellant stated an intent to submit complete bills for all repairs, claiming that the repair work was not required by the contract. In a letter dated October 7, 1963, the Government acknowledged a letter from appellant dated September 5, 1963 (not in file) and agreed that the incident "is no longer an issue" and "can be considered closed" and that "* * * the Government will make no claim for damages * * *."

Claim 7, for \$3,532.50 in increased costs and 60 days for delay in furnishing starting dimensions for ceiling tiles. A letter from appellant dated March 11, 1959, states that unless instructions are received in 14 days, he will file a formal claim for delays and costs incurred due to those delays. No amount was submitted at the time. It is not at all clear from the present record whether the amount presently claimed is for delay costs or relates to extra work performed. If the former, the Board has no jurisdiction over the claim in absence of a pay-

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for-delay clause. (See e.g., *Guy F. Atkinson Company*, IBCA-795-8-69 (January 6, 1970), 77 I.D. 1, 69-2 BCA par. 8041.)

Claim 8, for \$1,020 and 8 days for painting "exposed" piping. A letter dated December 8, 1959, from appellant states in part "Please be advised that we intend to file claim for all costs involved in this particular operation * * *." And "We request that this matter be referred to the Contracting Officer for determination and finding of fact." Neither amount nor days are given.

Claim 9, for \$276.12 and 3 days for relocating ceiling strapping in the darkroom area. A single letter dated October 22, 1959, supports the claim. It states in part "Please be advised that the receipt and execution of these instructions will involve an extra to the contract amount, and an extension of contract time." Neither amount nor time is stated.

Claims 10 and 11, for \$26,155.19 and 60 days for the alleged extra costs of working in the winter. The cost elements are for fuel, heaters, a truck, enclosure materials and increased labor costs. A letter from appellant dated November 25, 1959, refers to Section 20 of the General Conditions of the contract and states further:

We herewith put you on notice that we intend to file claim for all costs incurred in the heating of this building for construction operations * * * and for an extension of time for the additional work involved.

Neither amounts nor time are given.

Claim 13 for \$607.20 and 10 days for installing a 300-ampere service panel as ordered by the authorized representative of the contracting officer. The dispute seems to be whether or not such a panel was required by the contract. A letter from appellant dated October 9, 1959, requested \$607.20 plus 10 days' time. The Government acknowledged receipt of the letter. By letter dated December 23, 1959, appellant requested:

* * * that this matter be forwarded to the Contracting Officer and entered into dispute in accordance with the terms of the contract. We request that the Contracting Officer make a finding of fact concerning this matter.

Claim 14 for \$1,332.50 for 1,066 cubic yards of fill at \$1.25 per yard. One thousand sixty-six cubic yards was the difference between Government calculations of fill (3,010 cubic yards) and appellant's (4,109 cubic yards). A letter dated August 27, 1959, to the regional director, Fish and Wildlife Service, requested consideration of the matter.

Claim 15 for \$137.70 to effect certain repairs to a refrigeration compressor. A letter dated April 22, 1960, from appellant forwarded correspondence from the subcontractor and his bill for \$119.74, to which appellant had added 15 percent for overhead and profit. It does not appear to have been presented as a formal claim.

Claim 16 for \$7,541.70 and 90 days for installing cork refrigeration insulation rather than fiberglass. According to the correspondence there

was a disagreement over the manner of testing fiberglass insulation and its subsequent rejection by the Government. The correspondence indicates at most a request for a time extension based on an alleged delay in testing the material.

Claim 17 for \$928.63 and 4 days for cutting ceiling strapping to install certain light fixtures. The record does not indicate any evidence suggesting that this item was ever the subject of dispute. Appellant lumps this claim and Claim 9 together with Claim 7. We do not see, however, that these three claims are all necessarily connected.

Claim 18 for \$276 and 2 days, for the cost and time involved in moving certain filing cabinets delivered to the site by the Government. A letter dated October 15, 1959, states in part:

We wish * * * to put you on notice that unless instructions are received in the immediate future, these cabinets will be in our way on the site and it will be required that we move them several times in order to complete the flooring and ceiling installations. If this becomes necessary then it will be necessary to charge the Government the cost of moving these cabinets each time a move is necessary.

Claim 19 for \$299 and 3 days for spray lacquering of certain cabinets. None of the contemporaneous correspondence in the record indicates a dispute about which appellant had an intention to make a claim.

Claim 20, for one day of time for delay with respect to a choice of refrigerator door. Nowhere does the

correspondence indicate any delay due to this matter.

Claim 21 is a claim for a one-day extension of time to erase the assessment of one day's liquidated damages (\$500). The documentation refers back to the other claims herein described as the basis for the time extension.

On the record as presented by this correspondence we fail to find any reasonably adequate notice of claim with respect to Claims 6, 16, 17, 18, 19, 20 and 21. Notice, more or less, either of an intention to file a claim, or as a request for consideration of a dispute or an extra, appears evidenced for Claims 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14 and 15. Whatever notice is deemed given as to the latter group, none of the latter specify the contract provision involved (except as to Claims 10 and 11), the amount of money claimed (except as to Claims 13, 14 and 15), or when the delay occurred if time was requested. Government responsibility is alleged only in the broadest terms.

In his affidavit, Jordan H. Mishara does not add to what is revealed by the correspondence on the issue of notice. His position as to supplying additional claim data is, however, succinctly stated.

When I was first asked to sign the payment voucher, I again insisted that the claims be discussed, if necessary and decisions made where requested. I was told by Mr. DePiro that it might help if I would document the costs involved in each claim. I replied that the issue of entitlement should not have to depend on whether the amount of the claim was \$100.00 or \$1,000.00 and I felt I was en-

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titled to the Government's position on the merits * * *.

In his affidavit Mr. DePiro (Assistant Regional Director for Administration, National Marine Fisheries Service), states that he was in contact with Jordan H. Mishara for a period of time up through September 1964, during the course of work on another contract involving appellant, and that he on occasion inquired as to when Mr. Mishara was going to return the voucher. He reports Mr. Mishara as saying that he was not ready to return the voucher and file the claims because he was working on other matters.

In his affidavit Kenneth A. Lawrence, the contracting officer subsequent to March 1961, recounts a meeting in April 1961, called with regard to another matter, where he asked Jordan H. Mishara why he had not returned the final voucher and that Mr. Mishara's response was to the effect that he would then have to identify his claims and furnish full details within 90 days, and that he was not in a position to do so.

Dudley Crawford, who was regional engineer for the job, deposed that it would have been his responsibility as regional engineer to help determine the merits, but that his memory was significantly impaired by the passage of time.

Appellant also submitted the affidavit of David B. Graham, who was supervisory engineer on the job. Mr. Graham left Government employ in 1961, and in December 1971, moved to Hawaii. His affidavit con-

sists primarily of comments on the merits of the claims. He states further that after review of the correspondence and of plans and specifications as given him by Mr. Mishara his recollection has not been dulled by time.

The record also shows that appellant was not ignorant of administrative procedures as to contract claims. On September 14, 1964, appellant executed a final payment voucher on another job in final settlement of 37 claims, with one dispute pending before this Board. The record further shows that from 1961 to 1968, appellant prosecuted five bid protests before the Comptroller General, and from 1962 to 1970, prosecuted 13 claims before Boards of Contract Appeals.

On this record, as to those claims as to which some notice but no data was given, we are of the opinion that the contracting officer was reasonably justified in requesting and expecting the appellant to supply additional data with respect to his claims. Even though notice, in the broadest sense, was given, these letters alone do not supply enough information for a decision even on the limited issue of entitlement. To require a decision from the contracting officer under such circumstances is tantamount to asking him to read between the lines of appellant's notice and work up for himself what he might reasonably consider to be the claim and the legal and factual basis for it. The contracting officer cannot reasonably

be expected to do the contractor's claim presentation work for him, despite Mr. Mishara's apparent belief that he was entitled to a decision on the merits of entitlement on the basis of the bare notices. It is not as if appellant did not have the cost data. His exhibits 56 to 59 and 61 to 62 to his answers to the Government's interrogatories show receipt by Mr. Mishara of subcontractor's itemized statements in 1959 and 1960.

Accordingly, we conclude that the claims were untimely presented for the contracting officer's decision in any reasonably meaningful manner, and to the consequent prejudice of the Government which now finds itself essentially unable to defend on the merits because of the dissipation of its evidence in the 10 to 12 years that have passed since the work was done. We think the present case is within the scope of the holding and rationale of *Eggers & Higgins*.

In addition to the ground of prejudice the Government has also argued that certain claims are for breach of contract, rather than for adjustment under the contract. The Government's position has merit as to Claims 10 and 11, which together are for \$26,155.19 as the increased costs, including temporary heat, of working in the winter. According to appellant, the contracting officer should have suspended the work pursuant to Section 20 of the General Conditions, which reads as follows:

SECTION 20—TEMPORARY SUSPENSION OF THE WORK

The Engineer shall suspend the work by written order for such period or periods as are necessary because of extended unsuitable weather or for such other conditions as may be unfavorable for the prosecution of the work. Upon suspension the work shall be put in satisfactory condition and properly protected, as directed by the Engineer. In all cases of suspension of construction operations the work shall not be resumed until permitted by written order of the Engineer. Extensions of time will be allowed as provided in Clause 5(d) of the General Provisions but no extension of time shall release the Contractor and his sureties from their general obligations under the contract and performance bond. The Engineer shall also have authority to suspend the work for such time as is necessary because of the failure on the part of the Contractor to carry out orders given or to perform any of the provisions of the contract, but no extension of contract performance time will be allowed for such suspensions.

The clause clearly provides only for time as allowed by Clause 5(c) of the General Provisions (in this contract, Clause 5(c) of Standard Form 23A, March 1953 Edition), which in turn allows only for time extensions for excusable delay, but not money. As a claim for money based upon the failure of the Government to carry out an allegedly required positive task for the benefit of the contractor, and not a change in the work required of the contractor, the claim is for a breach of contract. *Central Florida Construction Co.*, IBCA-246 (January 5, 1961), 61-1 BCA par. 2903. The Board cannot adjust the price

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of a contract absent a contract provision provided for such an adjustment for the kind of claim presented. *United States v. Utah Construction & Mining Co., Inc.*, 384 U.S. 394 (1966).

In its motion to dismiss the Government has also raised the question of whether the *Severin* doctrine might not apply to these claims, insofar as they are based on subcontractor's claims. The *Severin* doctrine, briefly stated, holds that a prime contractor can only recover on behalf of a subcontractor if the prime has already reimbursed the subcontractor for the allegedly Government caused additional costs; or if the prime contractor remains liable for such reimbursement in the future. See *J. L. Simmons Company, Inc. v. United States*, 158 Ct. Cl. 393, 397 (1962); *Nils P. Severin v. United States*, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944).

In *Blount Bros. Constr. Co. v. United States*, 172 Ct. Cl. 1 (1965), the court pointed out a seeming difference between situations where the prime contractor was bringing an action for breach of contract against the Government (in the *Blount* case, for delay damages), where the subcontractor exculpated the prime for the breach, and situations where a provision of the prime contract provided for adjustment. In *Blount*, however, it appeared that the plaintiff admitted liability to the subcontractor, or that the in-

sulating language of the subcontract did not cover contract adjustment situations.

Following *Blount*, this Board appears to have taken the position that *Severin* did not apply to claims for adjustment of contract price under contract provisions. The statements in these cases were, however, broader than necessary, since the subcontract either lacked exculpatory language, as in *R. C. Hughes Electric Company, Inc.*, IBCA-509-8-65 (November 30, 1966), 66-2 BCA par. 5989 and *MacDonald Construction Company*, IBCA-599-10-66 (July 18, 1967), 67-2 BCA par. 6450, or the exculpatory language was expressly limited to breach of contract situation, as in *MacDonald Construction Company*, IBCA-381 (September 14, 1967), 67-2 BCA par. 6574.

Subsequently, in *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 703 (1968), the court appeared to leave open the question of applicability of *Severin* to claims for adjustment under the contract, emphasizing, however, that the burden would be on the Government to prove its applicability. On this point counteracting by implication, *G. L. Christian and Associates*, 160 Ct. Cl. 1, 9 (1963).

The views expressed in the *Morrison-Knudsen* case were anticipated to some extent in *Foster Construction Co.*, DCAB No. PR-36 (October 12, 1964), 65-1 BCA par. 4787. In *Foster*, the Board noted

that there is no authoritative court holding squarely on the question of the applicability of the doctrine to adjustment claims. It also stated that a valid principle of law applicable to Government contracts should not be lightly set aside by a Board on the basis of broad brush statements not closely allied with the facts of the cases in which they were made.

With respect to the present claims, 11 are being prosecuted on behalf of subcontractors for work partly or wholly performed by them. (Government's additional interrogatory No. 2 and appellant's answer thereto). As far as can be made out from the record these claims request \$22,727.28 for the subcontractors. Further, in answer to the Government's additional interrogatory No. 4, appellant stated:

Except for the items involved in the pending claims, all subcontractors have been paid in full for work under contract 14-17-008-16, see answer to 2 for names. They have not been paid for claims pending, because the determination as to merit has to be made.

Thus, it seems that as to these 11 claims (Claims 1, 2, 3, 4, 5, 6, 7, 9, 13, 15 and 16), the Board would be deciding subcontractor's claims.

Government counsel points out that on the present record the Massachusetts Statute of Limitation (Mass. Ann. Laws, Ch. 260, par. 2), with respect to contract actions is six years, and that the subcon-

tractors have no remedy at law against appellant as to these claims. The statute of limitations here would seem to insulate appellant totally from any requirement to reimburse the subcontractors on these claims, regardless of whether the subcontracts contained exculpatory language applicable to these claims or not. There is no "independent liability to do so in the future" (*J. L. Simmons Company, Inc. v. United States, supra*). On the basis of the record before us we conclude that the claims on behalf of the subcontractors are barred from consideration.

In *Eggers & Higgins* there was an oral hearing on the issue of prejudice. In this case appellant's counsel in a letter dated January 7, 1972, stated in this respect:

As to whether an oral hearing would serve any purpose, I frankly do not know. It is possible that such a hearing might assist in further clarification by way of oral argument or testimony. In any case, we have no objection to an oral hearing.

The Government has not requested a separate factual hearing on the issue of prejudice, although it requested "oral argument" on the motion. We conclude, therefore, that both parties consider the present record adequate to decide the motion. Since their briefs adequately state their positions, no additional oral argument was considered needed.

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Conclusion

For the reasons hereinbefore stated the Government's motion to dismiss is granted.

ROBERT L. FONNER, *Member.*

I CONCUR:

WILLIAM F. MCGRAW, *Chairman.*

**ARIZONA PUBLIC SERVICE
COMPANY**

5 IBLA 137

Decided *March 13, 1972*

Appeal from decision (Arizona 6014) by the Phoenix land office, Bureau of Land Management, rejecting right-of-way application in part.

Affirmed.

Patents of Public Lands: Generally—Rights-of-Way: Generally

Generally, when public lands are patented all title and control of the land passes from the United States and this Department has no authority to issue rights-of-way over the patent lands.

Patents of Public Lands: Reservations—Power: Transmission Lines—Rights-of-Way: Generally—Withdrawals and Reservations: Power Sites

Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Commission had granted a license for a transmission line are subject to the reservation prescribed by section 24 of the Federal Power Act

regardless of whether or not the reservation was stated in the patent.

Patents of Public Lands: Reservations—Power: Transmission Lines—Rights-of-Way: Generally—Rights-of-Way: Act of March 4, 1911

Where lands are patented subject only to a reservation under section 24 of the Federal Power Act, the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority.

Power: Transmission Lines—Rights-of-Way: Act of March 4, 1911

The Department of the Interior has authority under the Act of March 4, 1911, to grant rights-of-way over public lands for hydro-electric transmission lines which are not primary lines under the jurisdiction of the Federal Power Commission.

Patents of Public Lands: Reservations—Power: Transmission Lines—Rights-of-Way: Generally—Rights-of-Way: Act of March 4, 1911

Quaere: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way under the Act of March 4, 1911, over the patented lands. Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed under a different act, a reservation of the right will not be presumed.

Keating Gold Mining Company, Montana Power Company, Trans-ferree, 52 L.D. 671 (1929), overruled in part.

APPEARANCES: Anthony R. Kulina, Senior Right-of-Way Agent, Land Department, Arizona Public Service Company.

Opinion By Mrs. Thompson

INTERIOR BOARD OF LAND APPEALS

Arizona Public Service Company has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Lands, Phoenix land office, Bureau of Land Management, dated April 23, 1971, which rejected in part its right-of-way application, Arizona 6014, to maintain a constructed transmission line presently licensed by it under Federal Power Commission License No. 150.¹ The application was rejected as to lands which had been patented by the United States. The decision indicated that further processing of the application would continue as to the remaining federal lands under Bureau of Land Management jurisdiction.

The application was filed pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. sec. 961 (1964), which provides:

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over,

across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

The land office decision indicated that there is no authority under this Act to issue a transmission line right-of-way over lands which have passed from federal ownership.

Appellant disagrees with this conclusion, contending there is authority in the Bureau by virtue of the effect of section 24 of the Federal Power Act, 16 U.S.C. sec. 818 (1970), upon the lands in question.

Appellant points out that Federal Power Commission License No. 150, which was granted April 14, 1922, will expire April 30, 1972, and that

¹ The application stated it was for "a right to replace Federal Power Commission License No. 150 and covers an existing 69 KV transmission line originally constructed in 1922." It stated that the total length of the line to be installed is 29.489 miles, including 24.709 miles on lands owned by the United States.

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the Federal Power Commission has declined to renew the license on the ground that the transmission line no longer qualifies as a "primary line" as that term is used in the Federal Power Act (16 U.S.C. secs. 791-823 (1970)).² Appellant states that its license was one of the earliest licenses issued by the Federal Power Commission for hydroelectric transmission purposes. It asserts that the lines of many utilities which were initially licensed as "primary transmission lines" no longer serve primary line purposes and will be subject to similar renewal problems upon their expiration. It states that the decision on this appeal will establish a precedent which will have far reaching effect on utilities throughout the country whose licenses were of a later date. It contends that the integrity of the existing transmission systems should be preserved "which in this day of environmental concerns would be extremely difficult to replace or relocate."

² Appellant has furnished a copy of a letter dated September 9, 1970, to it from the Secretary, Federal Power Commission, stating in part: "On the basis of a recent staff study it appears that this transmission line is not a primary line or part of a 'project' as defined in Section 3(11) of the Federal Power Act and, therefore, would not be within the licensing authority of the Commission." There is no information in the record to indicate whether appellant exhausted the administrative processes before the Commission in determining whether a renewal would be granted. It has submitted a copy of its letter dated January 19, 1972, to the Commission requesting a one-year license. Apparently, it would surrender a license granted by the Commission, if this Department were to grant its right-of-way application.

Appellant further contends that the lands included in its license were withdrawn from entry, location or other disposal, and pursuant to section 24 of the Federal Power Act the withdrawal could not be vacated without affirmative action by the Federal Power Commission or Congress. Therefore, it asserts, the owners of the patented land do not have complete title to the land now and will not automatically gain complete title at the expiration of the license.

Appellant's contentions rest primarily upon the effect of section 24 of the Federal Power Act upon land patented after its application for a license was filed with the Federal Power Commission and was granted. This is the first time in an appeal proceeding in this Department this question has been raised.

Section 24 of the Federal Power Act was first enacted as section 24 of the Federal Water Power Act of 1920, 41 Stat. 1075. That Act was generally revised and made Part I of Title II of the Public Utility Act of 1935, receiving the name of the Federal Power Act, 49 Stat. 803. Section 24 had only minor, insignificant changes made then. *Id.* at 846. The Act of May 28, 1948, 62 Stat. 275, added a proviso not pertinent here. As amended by the 1935 Act, section 24 provides pertinently as follows:

Any lands of the United States included in any proposed project under the provisions of this Part shall from the

date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands;

* * *

It is true, as appellant contends, that the land was withdrawn under this provision when the application for the license for the transmission line was filed with the Federal Power Commission. But, the section provides that upon direction of the Commission or Congress such lands could be made available under the public land laws subject to any restrictions by the Commission, and subject to the reservation provided in that section. A direction as to the availability of lands occupied by

transmission lines has been prescribed by the Commission and is set forth in this Department's regulation 43 CFR 2344.2 (1972) as follows:

(a) On April 17, 1922, the Federal Power Commission made a general determination "that where lands of the United States have heretofore been, or hereafter may be, reserved or classified as powersites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the commission determines that the value of such lands so reserved or classified or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act."

This Department has issued patents under the authority of this general determination, including those involved in this case. The only limitation specified by the Commission was the reservation under section 24 of the Federal Water Power Act, which required that any patent expressly reserve the right of the "United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes" of the Act. Forty of the 55 patents in question here contained the reservation referring to section 24 of the Federal Water Power Act. Ap-

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pellant expresses concern over 8 patents issued without such a reservation.

When patents have issued for public land, the general rule is that all title and control of the land passes from the United States. See e.g., *United States v. Schurz*, 102 U.S. 378, 396 (1880). Thus, generally, this Department disclaims jurisdiction and refuses to consider applications for rights-of-way over land which has been patented. *Of., Florida State Road Department*, A-28914 (June 21, 1962). The Supreme Court, however, in considering what rights a permittee of an electric transmission line granted by the Secretary of the Interior under the Act of February 15, 1901, 43 U.S.C. sec. 959 (1970), had to the use of the line as against homestead patentees said, in *Swendig, et al. v. Washington Water Power Company*, 265 U.S. 322, 329 (1924) :

It was competent for Congress to make subsequent homestead entries subject to the Act of February 15, 1901, and to the regulations fixed by the Secretary. And undoubtedly the power and authority of the Secretary under the act may be so exercised as to affect the rights and limit the title of subsequent homestead entrymen. Within the scope of the authorization, he may make, and from time to time change, regulations for the administration of the act. The rights of appellants as entrymen were subject to the proper exercise of that power. * * *

Although there was no reservation of the right-of-way within the patent, the court held that the patentees took subject to the right-of-way, and that, under the regula-

tions in effect when the patents issued, only the Secretary of the Interior could revoke the right-of-way; the issuing of the patents did not do so. It emphasized, at 332 :

* * * The issuing of the patents without a reservation did not convey what the law reserved. They are to be given effect according to the laws and regulations under which they were issued. * * *

See also, *United States v. Frisbee*, 57 F. Supp. 299 (D. Mont. 1944), holding that where a statute required that minerals be reserved to an Indian tribe, a patent issued without such a reservation could not convey what the law reserved.

Since the Federal Water Power Act required the section 24 reservation where a license had issued by the Federal Power Commission, this case does not squarely fall within the general rule expressed above, as a right to the United States and its permittees or licensees has been reserved by virtue of section 24. For the purpose of this decision, we assume that the *Swendig* rule controls and that all of the patents, whether the reservation was expressed therein or not, are subject to the reservation made by section 24 of the Federal Water Power Act. The crucial issue raised is whether the Department has authority to issue a right-of-way for the right reserved by section 24.

In contending that the Bureau has authority to issue the right-of-way under the Act of March 4, 1911, where lands have been patented, subject to section 24 of the Federal Water Power Act, appellant cites

the following provision of the *Bureau of Land Management Manual*, Manual Release No. 240 of February 5, 1963, Vol. V, Chap. 9, 3.9.102:

.102 On receipt of a report from the FPC, and when all else is regular, a right-of-way will be issued for all lands formerly used under the FPC license whether or not the lands were subsequently patented.

A. Rental charges will be made accordingly and will be applicable from the date of cancellation of the FPC license.

B. Any right-of-way so granted will be made subject to the terms and conditions of 43 CFR, Part 244. [Now 43 CFR, Group 2800 (1971).]

(1) Each such right-of-way permit will contain the following statement when all or part of the lands were patented subsequent to the issuance of the FPC license:

"This right-of-way, as shown on the attached map(s) marked Exhibit —, is effective as to the public lands, and to such of the privately-owned lands crossed by the right-of-way as were patented subject to the provisions of Section 24 of the Federal Water Power Act (16 U.S.C. 818)."

The *Bureau of Land Management Manual* is an intra-Departmental instruction guide for employees administering the laws under the Bureau's jurisdiction. It does not have the force of a regulation or a Departmental decision. It does, however, reflect an understanding by the Bureau of its authority to issue rights-of-way where section 24 of the Federal Water Power Act is effective. Other intra-Departmental communications, specifically, memoranda issued by the Associate Solicitor for Public Lands, reflect a

different understanding. In an unpublished memorandum to the Director, Bureau of Land Management, December 28, 1961, the Associate Solicitor indicated that where land within a right-of-way granted by the Act of March 4, 1911, was subject to the reservation of section 24 of the Federal Water Power Act.

* * * upon expiration of the original term of a right-of-way granted under the Act of March 4, 1911, *supra*, over lands subsequently embraced within a power site reservation or withdrawal and thereafter patented, even though the right-of-way grantee may have no right of renewal under that Act or applicable regulations, he may still secure the right to the continuance of his use of the land, provided it is for a purpose under the Federal Water Power Act, *supra*.

This is converse to the situation presented here. Nevertheless, although not clearly stated therein, it appears from this memorandum that the Associate Solicitor considered the licensing of a right-of-way where lands had been patented subject to section 24 of the Federal Water Power Act to be exclusively within the province of the Federal Power Commission, since he indicated there could not be a renewal under the Act of March 4, 1911. This position is also manifest in another unpublished memorandum dated December 13, 1967, to the Chief, Division of Lands and Minerals Program Management, where the Associate Solicitor, in referring to the section 24 reservation, stated:

* * * The reservation pertains to the power values in the land; the reserved

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power values are administered by the Federal Power Commission. The use right is not public land nor an estate in public land which is under BLM administrative control. It is not necessary, at this time, to inquire into the extent of the Federal Power Commission's authority.

The language of section 24 of the Federal Power Act supports this view that the Commission may have exclusive jurisdiction since it expressly refers to the right to use the lands "necessary, in the judgment of the Commission, for the purposes of this Part." This indicates a determination is to be made by the Commission that the use is necessary for the purposes of the Act. If the Commission has exclusive jurisdiction over the right reserved by section 24 of the Federal Power Act, which could not be transferred to another agency, it would not appear that this Department would have any authority under the Act of March 4, 1911, since the Act grants the authority to issue rights-of-way to the "head of the department having jurisdiction over the lands." Thus, even if the term "public lands and reservations of the United States" in the Act of March 4, 1911, could be construed as applicable to the reserved right in patented land under the Federal Power Act, it is questionable whether this Department is the authorized agency to grant such a right.

The literal language of the Federal Power Act and the Act of March 4, 1911, supports a conclusion that this Department is not authorized under the Act of

March 4, 1911, to issue a right-of-way where lands are patented subject only to a section 24 reservation whether or not expressed in the patent.

We do note that this position with respect to patented lands subject only to the section 24 reservation of the Federal Water Power Act is different from the situation obtaining where public lands are involved. The line of demarcation between the authority of the Federal Power Commission and this Department, however, to issue rights-of-way over public lands for hydroelectric transmission purposes has not always been clear. For a number of years following the enactment of the Federal Water Power Act, the view in this Department was that the Act of March 4, 1911, had been superseded by the Federal Water Power Act as to all hydro-electric power projects unless allotted Indian lands were involved. Thus, the Department ruled that it had no authority to issue a right-of-way over lands embraced in a license issued by the Federal Power Commission even though the applicant for the right-of-way and the licensee were the same person. *Nevada Irrigation District*, 52 L.D. 371, *on rehearing*, 52 L.D. 377 (1928).

It was also held, even though no license had been issued by the Federal Power Commission, that this Department had no authority to grant a right-of-way over public lands for power purposes under the Act of March 4, 1911, for another

period or to extend the life of an original grant under the Act for an additional period of years. *Keating Gold Mining Company, Montana Power Company, Transferee*, 52 L.D. 671 (1929). Over the years, however, a shift in the view that the Federal Power Commission had exclusive jurisdiction over licensing all projects involving hydro-electric power, including distribution lines which were not primary lines, has evolved to the position now manifested in the regulations (43 CFR 2850.0-3(c) (1972)), that this Department has jurisdiction to issue rights-of-way over public lands for transmission lines which are not primary lines.³ The present position is

³ A review of the changes in the regulations shows the development of the Department's understanding of its authority and that of the Federal Power Commission with respect to rights-of-way for transmission lines. Footnote 78 under Part 245 of 43 CFR, 1938 edition, stated that the Act of March 4, 1911, and the Act of February 15, 1901, "are applicable only to projects for generating or conveying power other than hydro-electric, or in case of projects involving allotted Indian lands." The 1939 Supplement to the regulations at 43 CFR 245.2 was to the same effect, adding that no application for a right-of-way for transmission lines should be filed under the 1901 and 1911 Acts, "unless the electrical energy to be generated or conveyed is to be generated by means other than by water power, or the lands affected are allotted Indian lands. All other applications for power plants or transmission lines must be filed with the Federal Power Commission, * * *". The 1944 Cumulative Supplement at 43 CFR 245.2 changed this to "transmission of hydro-electric power defined in section 3(11) of the act [Federal Power Act], excepting distribution lines and rights-of-way over allotted Indian lands." It stated:

"All applications for rights-of-way for power plants or transmission lines, other than hydro-electric plants, and main or primary hydro-electric power transmission lines should be made under the act of February 15, 1901, or the act of March 4, 1911, and this part. Applications for hydro-electric power plant sites or

in conformity with a holding by the United States Court of Appeals for the District of Columbia Circuit,

rights-of-way for main or primary hydro-electric power transmission lines, excepting where the lands affected are allotted Indian lands, must be made to the Federal Power Commission."

The 1949 edition had a similar provision, 43 CFR 245.2. By Circular 1825, 17 F.R. 5902 (July 1, 1952), that regulation was renumbered and set forth basically similar in language as 43 CFR 244.39(c), adding that "Rights-of-way for transmission lines which are not primary lines must be secured under the act of February 15, 1901, or the act of March 4, 1911. See 18 CFR 2.2." This same provision is now set forth as 43 CFR 2850.0-3(c) (1972).

The first instructions of this Department under the Federal Water Power Act (Circular No. 729) issued November 20, 1920, 47 L.D. 595, provided that any application filed after June 10, 1920; the enactment of the Federal Water Power Act, which was wholly in conflict with lands reserved or classified as power sites, or covered by a power application under the Act would be rejected, except for certain circumstances not of note here. If an application conflicted with a transmission-line withdrawal "of a strip of land crossing the land applied for" entry would be allowed but notation on the entry and record would be made that it is subject to the conditions and reservations of section 24, Federal Water Power Act. The instructions stated that "withdrawn public lands are not subject to lease, or other disposition, other than such as is specifically recognized by [t]he Federal Water Power Act." 47 L.D. 597. They also stated that the lands within transmission-line permits or approved rights-of-way under the act of March 4, 1911, are deemed "classified as valuable for power purposes," and, "whether withdrawn as power-site reserves or not, occupy the status of withdrawn lands for the purposes of these regulations." 47 L.D. 598. The import of this latter statement is now set forth in the present regulation, 43 CFR 2344.1 (1972), stating:

"The following classes of lands are considered as withdrawn or classified for power purposes of section 24 of the Federal Power Act: * * * lands within transmission-line permits or approved right-of-way under * * * the act of March 4, 1911 * * *"

Thus, this Department has treated transmission-lines granted under the Act of March 4, 1911, as within the power purposes of the Federal Power Act, at least, for the purpose of the reservation in section 24 of that Act.

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Pacific Power & Light Co. v. Federal Power Commission, 184 F.2d 272 (1950). To the extent the *Keating* case, *supra*, may be read that this Department has no authority to issue rights-of-way over public lands for hydroelectric power lines which are not primary lines it is overruled.

This discussion brings into focus two additional issues involved in this case which were not pointed out in the decision below. The first issue is whether this Department has authority to reserve a right to grant rights-of-way under the Act of March 4, 1911, when lands are patented. The second issue, corollary to the first, is whether, if it has such authority, it has been exercised here so as to afford a basis for granting the right-of-way.

It is unnecessary in this case to resolve finally the first question since, as will be discussed, we conclude there has not been a clear exercise of such authority if it exists. We note, however, that the Associate Solicitor in the December 13, 1967, memorandum has expressed the view that the United States cannot effectually reserve rights under the 1911 Act, although, he recognizes that a patentee may take land subject to an easement or other right-of-way. We question whether this view is correct. The *Swendig* case, *supra*, is good authority for the proposition that the Secretary in implementing an act, such as that involved there, the Act of February 15, 1901, and the Act of March 4, 1911, which is very sim-

ilar, which gives him authority to prescribe rules and regulations, may condition and limit grants under other acts by such regulations. An insertion in a patent also would make the reserved limitation even stronger. Furthermore, where the act under which a patent is issued gives discretionary authority to the Secretary in allowing patent, it has been recognized that he may qualify grants of benefits under the act by making them subject to certain limitations and restrictions. See the discussion in the *Solicitor's Opinion*, 60 I.D. 477 (1951); *John L. Rice*, 61 I.D. 175 (1953). Therefore, we raise this issue of the authority of the Secretary to reserve a right in patented lands to grant rights-of-way under the Act of March 4, 1911, for further consideration in the Department.

Even if this Department has such authority, nothing has been shown in this case to support a conclusion that it has been exercised in such a manner as to make clear that there was a reservation of the right to the United States which could be exercised by this Department under the Act of March 4, 1911, after the appellant's license with the Federal Power Commission expired. The regulations do not so clearly provide.⁴ Although appellant has not discussed any of the patent provisions, except as discussed previously, we have checked the patents covered by appellant's applications. The strongest argument that this

⁴ See n. 3, *supra*, and 43 CFR 1821.4-1 and 2, and Parts 2800 and 2850 (1972).

Department has reserved a right may be made from ten patents (three of which also mentioned the section 24 reservation of the Federal Power Act) issued under the Small Tract Act, 43 U.S.C. sec. 682a (1970), during the period 1955 to 1957, which stated:

Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. sec. 961).

Nevertheless, after considering arguments why this provision might or might not constitute a reservation, we are not convinced that it is. Appellant has not advanced legal arguments concerning this provision. It is sufficient to say that at the time the patents issued with this language the Arizona Public Service Company was not licensed under the Act of March 4, 1911. We believe this language is inadequate to compel a conclusion that the United States reserved a right in the future to grant a right-of-way under the Act of March 4, 1911. In these circumstances a reservation of the right will not be presumed.

We realize that this Department's refusal to issue a right-of-way for the reasons heretofore expressed exposes a seeming hiatus in the Government's manifested authority to authorize the maintenance of this existing transmission line if the Federal Power Commission decides further that it has no authority to issue additional licenses to maintain the right-of-way. We offer no com-

ments on whatever rights appellant may have under state law to maintain the line in such eventuality, nor need we comment further on the Commission's authority in this regard.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed for the reasons above-stated.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.
(See additional concurring statement.)

DOUGLAS E. HENRIQUES, *Member*.

I DISSENT IN PART:

FREDERICK FISHMAN, *Member*.

EDWARD W. STUEBING, CON-
CURRING SPECIALLY

I am in agreement with the panel majority as to its findings with regard to the effect of section 24 of the Federal Power Act, its findings as to the applicability of the 1911 statute, and with the result reached in the case. The purpose of this separate opinion is to express in more positive terms my view with reference to the effect of the provision inserted in the several small tract patents regarding the use of the land under the Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. sec. 961 (1964)).

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The question is whether the inserted provision made the patented lands subject to a right-of-way under the 1911 Act. The majority opinion holds that the provision "will not be presumed" to constitute a reservation under the Act. Although I agree, I regard this as a rather equivocal disposition of a salient issue. The dissenting opinion takes the position that it operated as a reservation to the United States of the right to grant a way under that act. This I view as error. The provision in these several patents reads:

Subject to such rights-of-way for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253) as amended (43 U.S.C. sec. 961).

All agree that the Arizona Public Service Company had no right-of-way under the Act of March 4, 1911, for electric transmission line purposes at the time that the patents issued and that it has not since been granted any. It is apparent, at least to me, that since the provision was limited to such rights-of-way as the company had under the Act, and since the company had none, no right-of-way could be imposed, or reserved, by the provision.

It is my surmise that at the time these patents issued the issuing officer entertained some doubt as to whether the transmission lines which crossed the land were authorized exclusively by section 24 of the Federal Power Act, or whether the Arizona Public Service Company

might also have some right-of-way by virtue of the Act of March 4, 1911. He did not want to issue a patent in derogation of the right of the company, neither did he wish to make the land subject to a use which did not exist. He happily avoided any chance of error in this regard by providing, in effect, that to whatever extent the Company had a right-of-way over the land under the 1911 Act at the time the patent issued, the land would remain subject to such use. In so doing he assured that if the company did have a right-of-way under the 1911 Act it would be preserved. If not, no harm would be done the grantee because the words of condition and limitation would prevent the provision from taking effect.

The language employed is explicit and the meaning thereof is clear. The provision is simplicity itself. There is no ambiguity which requires construction, no doubts to be resolved, no obscure implications to be drawn. Nothing suggests that the draftsman was unskilled in expressing his meaning. On the contrary, the provision obviously means precisely what it says. Where the language is sufficiently clear to define the character and extent of the reservation or exception it must be given effect. In fact, in order to broaden the meaning of the provision so as to imply a continuing right in either the United States or the appellant, it would be necessary to ignore the words of condition and limitation which were deliberately written into it. However, the ex-

ception in the patents is restricted and limited by a condition which prevents its operation and effect if the condition does not exist, and that condition has never existed.

While I find no fault with the principles of law enunciated in the dissenting opinion, it is my view that they have no application to this facet of the case.

FREDERICK FISHMAN, DISSENTING IN PART

I question that portion of the decision which deals with the impact of the language contained in the ten small tract patents and concluded in essence that the language was nugatory.

The provision inserted in the small tract patents reads as follows:

Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. sec. 961).

The main opinion addresses itself to that provision as follows:

* * * It is sufficient to say that at the time the patents issued with this language, of course, the Arizona Public Service Company was not licensed under the Act of March 4, 1911. We believe this language is inadequate to compel a conclusion that the United States reserved a right in the future to grant a right-of-way under the Act of March 4, 1911. In these circumstances a reservation of the right will not be presumed.

The first issue to be resolved is whether the United States is authorized to make a conveyance under the Small Tract Act, as

amended, 43 U.S.C. secs. 682a-682e (1970), reserving a right to issue a right-of-way over the land after it has passed into private ownership. Stated broadly, the first proposition is whether an administrative officer, in whom a statute vests discretionary power to grant or deny requested benefits, may qualify the grant of benefits by making them subject to terms deemed by him to be appropriate, if such terms are not prohibited by law.

In *Southern Pacific Co. et al v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922), the Court, in discussing a discretionary authority of the Secretary of War, stated: "* * * The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to * * * condition an approval."

See *Golden Gate Bridge and Highway Dist. of Calif. v. United States*, 125 F.2d 872 (9th Cir. 1942), *cert. denied*, 316 U.S. 700 (1942).

With respect to a public sale under 43 U.S.C. sec. 1171 (1970), a statute vesting discretionary authority in the Secretary of the Interior, the court said in *Ferry v. Udall*, 336 F.2d 706, 709 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965):

Since the Secretary has discretionary power to refuse to sell at all, he also has the authority to set any conditions consistent with the Act, upon which the sale may be made. *Of. Southern Pacific Co. et al. v. Olympian Dredging Co.*, 260 U.S. 205, 208, 43 S. Ct. 26, 67 L. Ed. 213 [1922].

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The authority to impose conditions with respect to an exercise of discretion is stated in *Sunderland v. United States*, 266 U.S. 226, 235 (1924), as follows:

* * * Indeed, we think the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. * * *

Sunderland also stands for the proposition that a deed provision imposed by the United States is not to be tested by the power of an ordinary grantor to impose a like restraint on an ordinary grantee.

The Department has recognized the principle¹ that a discretionary

conveyance by it may be made subject to reservations, neither explicitly authorized nor specifically forbidden by law. *Solicitor's Opinion*, 60 I.D. 477 (1951). Indeed, in *John L. Rice, supra*, the Department authorized the insertion in a patent of a reservation of a right-of-way for driving sheep across the land and of overnight stopover privileges for such sheep. *Cf. Solicitor's Opinion*, 62 I.D. 22, 24 (1955).

The second area of concern is the meaning and effect of the language included in the small tract patents.

The rule of interpretation of patents is set forth in *Northern Pacific Ry. v. Soderberg*, 188 U.S. 526, 534 (1903), as follows:

* * * Nothing passes by implication, and unless the language of the grant be

¹ I have not relied upon *Swendig et al. v. Washington Water Power Company*, 265 U.S. 322 (1924), as authority for the proposition that, under the regulations in effect at the time the patents were issued, the Secretary of the Interior may reserve, in an instrument of conveyance the right to continue a right-of-way. *Swendig* rests upon a Departmental regulation 41 L.D. 152, par. 9 (1912) which reads as follows:

"The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act."

In contradistinction, 43 CFR § 2234.1-3 (a) (2) (1964) provided:

"All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way."

This latter regulation is ambiguous with respect to the term "subject to." As pointed out, *infra*, the term is susceptible to meaning either (a) a recognition of a servitude, or (b) a reservation to the United States. In keeping with the doctrine that regulations should be

so clear that there is no basis for disregarding them in affecting rights, I am constrained to the view that the term "subject to" in the 1964 regulations must be read as the recognition of a servitude. See *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971).

However, I do regard *Swendig* as authority for the proposition that the Secretary has authority to preserve his control by regulation over rights-of-way granted by him even though the land is subsequently patented. *Cf. BLM Chief Counsel's Opinion*, August 27, 1951. In essence, the Secretary can so specify in the instrument of conveyance and in general regulations. I am aware of the opinions which indicate otherwise and are found in the Department's litigation file re *State of Washington v. United States*, Civil No. 1895, U.S.D.C. Washington, S.D. None of these documents addresses itself to *Swendig*. The opinions are based upon the rules of real property controlling private conveyances. As pointed out in *Sunderland*, a deed provision imposed by the United States is not to be tested by the power of an ordinary grantor to impose a like restraint on an ordinary grantee. *Cf. United States v. Union Pacific R.R.*, *supra*.

If it is determined to be the policy of the Department to endeavor to retain control over rights-of-way despite subsequent alienation of the fee, it may wish to consider the feasibility and desirability of formulating appropriate regulations.

clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The doctrine is again enunciated in *United States v. Union Pacific R.R., Co.*, 353 U.S. 112, 116 (1957), as follows:

* * * Such a construction would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language and that if there are doubts they are resolved for the Government, not against it. *Caldwell v. United States*, 250 U.S. 14, 20-21 [1919]. * * *

Caldwell recites “* * * the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government.” * * *

See also *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942).

The concept is often enunciated that only reservations specifically authorized by law may be inserted in patents, relying on *Davis's Administrator v. Webbald*, 139 U.S. 507, 527-528 (1891); *Deffebach v. Hawke*, 115 U.S. 392, 406 (1885); *Burke v. Southern Pacific R.R.*, 234 U.S. 669, 699-705 (1914). However, as clearly shown in the *Solicitor's Opinion*, 60 I.D. 477 (1951), that principle applies to “* * * statutory provisions which placed upon

this Department the mandatory duty of conveying public lands to persons who met certain requirements prescribed in the controlling legislation.” * * *

In the case at bar, we are concerned with a different situation—the Small Tract Act is a discretionary statute.

In the frame of reference of construing ambiguities in patents in favor of the United States, we next consider the language of the provision inserted in the small tract patents.

Concededly, the term “subject to” in an instrument of conveyance ordinarily connotes that the estate transferred is subordinate or subservient to a servitude.

However, in public land parlance, the term “subject to” is often used in the sense of “reserving to the United States.”² It is noteworthy that every one of the small tract patents in issue recites in part as follows:

This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utility purposes, to be located * * * [along the boundaries of said land].³

² E.g., see patent no. 1228506 issued to the State of Alaska on July 20, 1962, approved by the Attorney General on September 4, 1962. This patent recites in part that it is “* * * subject, however, to * * * (2) a right-of-way for ditches or canals constructed under the authority of the United States, as authorized by the act of August 30, 1890 * * * (3) a right-of-way for the construction of railroads, telegraph and telephone lines in accordance with the act of March 12, 1914 * * *.”

³ The bracketed material appears in several of the patents. Other small tract patents involved recite, in lieu of the bracketed material “across said land or as near as practicable to the exterior boundaries.”

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If the right-of-way is "to be located," it is obvious that it was not an existing servitude affecting the land at the time patent issued. It is in essence a *reservation* of a right-of-way.

It should be noted that at no time did the Arizona Public Service Company have a right-of-way across the lands in issue under the 1911 Act. What meaning, if any, then is to be given to the phrase "Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), *as amended* (43 U.S.C. sec. 961)?"

I am unwilling to conclude that the language is without effect. Concededly, it is inartfully phrased and, at best, is ambiguous. Applying the rule of construction that provisions in a patent are to be construed in favor of the United States, it appears, although not completely free from doubt, that the patents were intended to reserve to the United States the right to grant a right-of-way to the appellant, for the existing line, under the 1911 Act.

The question next to be faced is whether the retained interest in the United States is within the ambit of "public lands and reservations of the United States" and does this Department have "jurisdiction over the lands"? ⁴

⁴ The Act of March 4, 1911, *supra*, reads in part as follows:

"The head of the department having jurisdiction over the lands he, and he is, authorized and empowered, under general regulations to

Solicitor's Opinion, M-36703 (April 7, 1967) states:

We believe that "reservations of the United States" as used in the subsection includes Indian [R]eservations. The phrase "all public lands and reservations of the United States" is one of art used by the Congress when it means to encompass *all lands in which the United States has an interest*, and has been consistently so interpreted by the courts and this Department. [Italics supplied.]

My view that the retained interest is within the ambit of "reservations" is further buttressed by the definition embodied in sec. 3(2) of the Federal Power Act of June 10, 1920, *as amended*, 16 U.S.C. sec. 796(2), as follows:

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and *interests in lands owned by the United States*, and withdrawn, reserved, or withheld from private appro-

be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, *over, across, and upon the public lands and reservations of the United States* for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: * * * [Italics supplied.]

priation and disposal under the public land laws: * * * [Italics supplied.]

Cf. FPC v. Oregon, 349 U.S. 435, 446-448 (1955).

This leads us to the question whether the Secretary of the Interior is "[t]he head of the department having jurisdiction over the lands * * *."

Section 24 of the Federal Power Act, *as amended*, 16 U.S.C. sec. 818 (1970), provides in part as follows:

Any lands of the United States included in any proposed project under the provisions of sections 792, 793, 795-818, and 820-823 of this title shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. * * *

This quote seemingly impels the conclusion that land in a project is under the exclusive jurisdiction of the Federal Power Commission. In construing the 1911 Act, the Bureau of Land Management recognized that:

It is clear from the statute that the Congress recognized that more than one federal agency might have some jurisdiction as to lands embraced in a reservation and that as a condition precedent to the granting of a right-of-way under the law [the 1911 Act] all such agencies having any jurisdiction over reservations must consent thereto. [Footnotes omitted.]

Washington Water Power Company, Idaho 09429 (April 10, 1959);

cf. Middle Park Conservancy District, et al., Denver 050054 (August 13, 1957).

Sec. 24 of the Federal Power Act, *as amended*, explicitly recognizes that upon a favorable determination by the Federal Power Commission that the value of public lands for power purposes will not be destroyed by disposal:

* * * The Secretary of the Interior upon notice of such determination, shall declare such lands open to location, entry, or selection. * * *

This is precisely what happened. The Federal Power Commission had made a general determination that transmission lines would not bar the disposal of public lands, subject to the reservation embodied in section 24 of the Federal Power Act, *as amended*. The Department thereafter favorably considered the small tract applications, and under my concept of the case, reserved a right to issue under his jurisdiction and authority a right-of-way under the 1911 Act to the appellant over the lands patented. It would seem to follow that the Secretary of the Interior is "[t]he head of the department having jurisdiction over the [interest in] lands. * * *"

I recognize that the result with respect to the small tract patents reached in the major opinion would be compelled if the conveyance had been made by a party not the sovereign. That result in my judgment, disregards the principles governing interpretation of federal patents.

March 15, 1972

ESTATE OF CHARLES TRACK, A/
K/A CHARLES AFRAID OF HIS
TRACK (DECEASED FORT PECK
ALLOTTEE NO. 1106 PROBATE NO.
K-61-69-S)

1 IBIA 216

Decided March 15, 1972

Appeal from Secretary's decision
after rehearing.

Affirmed.

425.25 Indian Probate: Wills: Revocation

The concept of revival of previously revoked wills is cognizable in Indian probate cases and where it appears that the Indian testator intended to republish by codicil a will which had been revoked by a subsequent will, the earlier will is deemed to have been revived by the codicil and the intervening will revoked by the codicil.

390.0 Indian Probate: State Law: Generally

Montana statutes pertaining to inheritance from illegitimates are derived from early California statutes pertaining to the same subject, and under such statutes a father of an illegitimate may not inherit from his illegitimate child unless (1) the father, after marrying the mother has adopted the illegitimate into his own family, or (2) the father, after marrying the mother of the illegitimate, acknowledges his paternity.

APPEARANCES: Robert Hurly and L. Neil Axtell for appellant Joan Track Clampitt James McCann for Raymond Track and other unspecified heirs of the decedent; James L. Samsaver and Baxter Larson for Aloysius First Sound and Lena First Sound.

Opinion By Mr. Lasher
**INTERIOR BOARD OF
INDIAN APPEALS**

This matter is before this Board on separate appeals filed by Joan Track Clampitt and Edith Cooper from a Decision After Rehearing entered by the Secretary of the Interior, Rogers C. B. Morton, on June 29, 1971.¹ At the time of issuance of the Secretary's decision, all parties in interest were advised of their right to file an appeal with this Board. The Secretary's decision affirmed the examiner's "Order Approving Will of November 13, 1958, and Codicil of March 9, 1965, and Decree of Distribution" (hereinafter referred to as "Order Approving Will") entered by the examiner on March 7, 1969.

I. FACTUAL BACKGROUND

The decedent, Charles Track, passed away on April 30, 1965, at age 88. During the last seven years of his life he executed three testamentary instruments:

1. A Last Will and Testament dated November 13, 1958, executed at the Fort Peck Indian Agency on a standard form printed by the Bureau of Indian Affairs for such purposes. (Referred to herein as the 1958 will.)

¹ Ordinarily, the decision after a rehearing would have been rendered by the examiner who conducted the hearing, in this instance, David J. McKee. However, because of Mr. McKee's unavailability by virtue of his appointment as Chairman of this Board, the Secretary requested that the record in this case be certified to him for decision. Mr. McKee has disqualified himself and has not participated in this decision on appeal.

2. A will dated November 14, 1964, which contained a customary revocation clause revoking "all former wills and codicils" made by the testator.²

3. A codicil to the 1958 will dated March 9, 1965. This instrument, which did not contain a revocation clause, changed the 1958 will in only one respect: the half-interest in decedent's 4-room frame house which was left to appellant, Joan Track Clampitt, in the Sixteenth paragraph of the 1958 will, was revoked and the whole interest was devised to Elizabeth Track Brown.³

² Referred to herein as the 1964 will. The circumstances surrounding the execution of this will, which was not approved by the examiner, is described by the examiner in his Order Approving Will as follows:

"The record indicates that this document was available in the home wherein the testator was residing with his daughter, Joan Clampitt and her husband, and that no attorney or other completely disinterested person, except the witnesses, participated in its execution. The record does not show it, but the original of this will was received by the examiner with a letter of transmittal written by Robert Hurley [sic], attorney at law, Glasgow, Montana, who indicated that he had prepared the same and mailed it to the home of the testator and that he had no further connection with the will, except that the same was returned to him for safekeeping after it was executed. The record does reveal that the testator was so physically incapacitated at the time that he did not attempt to make the trip from Frazer, Montana, to Glasgow, Montana, for the purpose of seeing the attorney or giving him instructions concerning the preparation of the said will."

³ Referred to herein as the 1965 codicil. In his Order Approving Will the examiner made the following findings relative to the execution of the codicil:

"The third testamentary disposition under consideration is the codicil dated March 9, 1965. This testator sent word to the agency that he wished to draw a new will, according to the testimony of Ila Mae McAnally, who, after 1958, had continued her employment at the Fort Peck Agency with the same duties. The testator, because of physical incapacities,

By his 1958 will, *as amended* by the 1965 codicil, the decedent disposed of his interests in various trust properties by specific devises to his seven children,⁴ a nephew James L. Long, and eight grandchildren. On the surface, it would appear that by the 1958 will the decedent intended a fairly equal division of his property among the objects of his benefaction. By contrast, under the 1964 will,⁵ appellant Joan Track Clampitt is the primary beneficiary, receiving all of decedent's property with the exception of three specific devises to Elizabeth Track Brown, Hazel T. Anderson, and Raymond Track. In addition, she is named executrix.

The decedent was married three times. His first wife bore him one child which died in infancy. The children named as devisees in the 1958 will were the product of Mr.

was unable to travel to the agency for this purpose, and, accordingly, Mrs. McAnally proceeded to the home of his daughter, Elizabeth Track Brown in Wolf Point, Montana, where the testator was residing at that time. She testified that she then had no knowledge of the existence of the 1964 will, but that she did take the original of the 1958 will with her for comparison and such other purpose as it might have.

"Upon her arrival at the home of Elizabeth, she was directed to the room where the testator was. She read the 1958 will to him in English, but her memory is not specific as to how far she progressed before he stopped her, indicating that his wish at that time was to change only the beneficiaries of the house mentioned in paragraph Sixteenth."

⁴ Five daughters, Eva Mae Smith (predeceased), appellant Edith Track Stevens (Cooper), Elizabeth Track Brown, appellant Joan Track Clampitt, and Hazel Track Anderson, and two sons—Raymond Track and Roy C. Track.

⁵ This will was determined by the examiner to have been revoked by the 1965 codicil.

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Track's second and third marriages. During the third marriage,⁶ Lena First Sound (sometimes referred to in the record as Tena First Sound and Tena Bearskin First Sound), to whom decedent was never married, bore him an illegitimate son, Charles Track #2, hereinafter referred to as "Charles First Sound." This illegitimate son's name was officially changed to Charles First Sound in a Tribal Court proceeding on June 23, 1941, during which Charles Track admitted paternity. The decedent never adopted Charles First Sound or took him into his home, nor did he contribute to the care or support of this son who was raised by Lena First Sound. However, upon the death of Charles First Sound on April 12, 1952, the decedent, in the probate of his son's estate, was determined by the Examiner, J. R. Graves, to have inherited a 1/2 share of his son's allotment, the other half going to Lena. It is from this inequitable situation that Lena's claim against the decedent's estate arises.⁷

The issues raised on this appeal relate primarily to the effect of the 1965 codicil in reviving the 1958

will, and the validity of the claim of Lena First Sound.⁸

II. REVIVAL OF THE 1958 WILL

The appellant, Joan Track Clampitt, contends that if it is determined on this appeal that decedent had sufficient capacity to execute the 1965 codicil, the codicil must stand alone unrelated to the 1958 will since the 1964 will permanently and effectively revoked the 1958 will.⁹ Stated another way, the appellant maintains that the 1958 will, because of its prior revocation, had no legal existence at the time the 1965 codicil was executed, and was not susceptible to revival even if Mr. Track were capable of executing the 1965

⁸ Although the testamentary capacity of the decedent at the time of the execution of the 1964 will and the 1965 codicil was questioned on several occasions during the proceedings, if these issues were not abandoned by the parties, as appears to be the case, certainly the paucity of evidence introduced on the subject was insufficient to overcome the presumption of testamentary capacity arising from the regular execution of the will and codicil. See *Estate of William Cecil Robedeaux*, 1 IBIA 106; 78 I.D. 234 (1971). We see no need to dwell on this point. Suffice it to say that we have carefully reviewed the record and are satisfied that the testator had the requisite capacity to make final testamentary disposition of his property on both occasions.

The appeal of Edith Cooper challenging the propriety of the attorneys fees allowed herein amounts to nothing more than an expression of opinion on her part. Although the amounts of these fees are substantial, they are not unconscionable and there is no indication that the examiner abused his discretion in arriving at the amounts allowed.

⁹ As we have previously pointed out, Joan Track Clampitt is the primary beneficiary under the 1964 will.

⁶ Decedent's third wife was Mary Parnell.

⁷ Lena First Sound has sought repeatedly, but unsuccessfully, to have the decedent's half-share in her son's allotment distributed to her. Her claim herein, although overtly based on decedent's failure to support his illegitimate son, is, in reality, a further effort to obtain the decedent's interest in the allotment. Due to the complexity of the questions posed, further discussion thereof will be reserved to separate sections of this decision.

codicil. We disagree with this rationale for the reason that it ignores the well-established concept of revival of previously revoked wills.¹⁰

Simply stated, the "revival" rule is that of a codicil is executed which purports to be a codicil to a will which has been revoked by a later will, the later will is thereby revoked by implication, and the earlier will is revived, provided it is still in existence. 57 Am. Jur. *Wills*, sec. 488 (1948); Annot., 33 A.L.R. 2d 922 (1954). The theory of the rule is that since the republication of a will once revoked makes such will speak as of the time of the republication, a codicil which republishes an earlier will impliedly revokes an intervening will which revokes the earlier will either expressly or by reason of provisions inconsistent with those of the earlier will. 57 Am. Jur., *Wills*, sec. 488 (1948); cf. Annot., 59 A.L.R.2d 11 (1958).¹¹

A prior will must be in actual existence to be revived by a codicil which refers to it in adequate terms where the prior will had been previously revoked. 95 C.J.S. *Wills*,

sec. 303b(2)(b) (1957). In the instant case, the 1958 will was not physically destroyed or mutilated. It was in actual physical existence and at least part of it was read to the decedent by the scrivener at the time the decedent executed the 1965 codicil.¹²

In order to effect a revival of a revoked will by a codicil, it must also appear that the testator intended to revive the previously revoked will. The testator's intention must appear in the codicil itself, 95 C.J.S. *Wills*, sec. 303b(2)(b), or from other evidence. See 3 Page, *The Law of Wills*, sec. 29.150 (1961). A reading of the 1965 codicil reveals that the 1958 will was specifically referred to therein. Furthermore, the 1965 codicil made an express change in the 1958 will, and such change is entirely consistent with a revival of the 1958 will and inconsistent with the 1964 will. The facts of this case are to be distinguished from the situation where the codicil makes an ambiguous reference to the decedent's "last will" or in which changes made in the codicil could be equally applicable to the intervening will as well as the prior will.

From this, and with due consideration to the testimony of the scrivener, we conclude that the decedent intended to revoke the 1964 will and the revocation clause contained therein and to revive the

¹⁰ The words "republication" and "revival" have, from a technical standpoint, different meanings. When a codicil is said to "republish" a will, it is meant that a will, then valid and in effect, but originally considered to have been published as of the date of its execution, is republished as of the date of the codicil. When it is said that a codicil has "republished" a will not otherwise in effect because of its prior revocation, something has been added, namely, the revival of a formerly, but not presently, effective instrument. See Annot., 33 A.L.R.2d 922 (1954).

¹¹ We see no reason why such rule should not be cognizable in and applicable to Indian probate proceedings, where the circumstances warrant it.

¹² It does appear, however, that at the time the 1965 codicil was executed the scrivener, Mrs. Ila Mae McAnally, was unaware of the existence of the 1964 will.

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1958 will. There is no showing to the contrary.

A final problem in connection with the revival of the 1958 will arises from the fact that the scrivener of the 1965 codicil, Mrs. McAnally, was unaware of the existence of the 1964 will. It might be contended that the scrivener's mind should be considered as if it were the mind of the testator, and that, accordingly, there could be no intention to revive the former instrument since it was not known to the scrivener that it had even been revoked. However, there is considerable precedent for the rule that in order to effect a revival of the earlier will, knowledge of its subsequent revocation is not necessary. *See Annot.*, 33 A.L.R.2d 922 (1954). We subscribe to this view and are satisfied that in the circumstances of this case the ignorance of the scrivener as to the existence of the 1964 will is not crucial inasmuch as it otherwise appears that it was the intention of the decedent to revive the 1958 will.

Accordingly, the decision of the Secretary of the Interior of June 29, 1971, affirming Examiner McKee's Order Determining Heirs is, in this respect, affirmed for the reasons stated hereinabove.

III. THE CLAIM OF LENA FIRST SOUND

A. History.

When Charles First Sound passed

away in 1952, unmarried and without issue, his allotment passed to his father and mother who each received an individual one-half interests therein. Mention is made in the record that the decedent herein forthwith executed an affidavit disclaiming any interest therein,¹³ whereupon he was advised by the hearing examiner conducting the probate of his son's estate that if he so desired he could execute a deed conveying his interest to Lena First Sound. The decedent actually executed such a deed on December 1, 1954. However, the deed was not approved by the Area Office because the decedent's wife, Mary Parnell, refused to extinguish her inchoate dower rights by joining in the deed and also because the deed failed to specify that oil and gas rights in the property were reserved to Indians having tribal rights on the Fort Peck Reservation as required by pertinent federal statutes.

After the deed was returned to the decedent without approval he made no further attempts to meet the requirements necessary for a valid conveyance of his interest in

¹³ We do not find this affidavit in the record herein or in any of the associated files we have examined in reaching our determination. It appears, however, that the decedent was motivated at this time by a sense of fairness, perhaps stemming from his failure to adopt his son or otherwise make any contributions to his son's care and support during the twenty-four years of his life.

the lands in question to Lena First Sound.¹⁴

On June 22, 1967 Lena First Sound petitioned the Secretary of the Interior for approval of the 1954 deed, the Superintendent, the Area Director, and Commissioner of Indian Affairs having previously refused approval thereof. In a decision entered June 11, 1968,¹⁵ by Harry R. Anderson, Assistant Secretary of the Interior, the appeal was denied.¹⁶

Lena First Sound filed her claim herein on June 12, 1965 in the sum of \$13,322.50, computed to some extent on the basis of a daily charge of \$1.50, for the "proportionate share of support given by claimant to the decedent's son" during the

son's lifetime. In his "Order Approving Will" herein, the examiner sustained this claim, but in the enlarged sum of \$27,500.¹⁷

Although we generally agree with the result reached by the examiner, from our review of the record in this matter and the record in the Estate of Charles First Sound, deceased Fort Peck Allottee No. 3550, we believe that in order to reach a sound and truly just decision in this matter, we must first recognize and answer a basic question not heretofore raised by any of the parties hereto, *i.e.*, whether the decision by Examiner J. R. Graves in the Estate of Charles First

¹⁴ Perhaps due to the fact that the property had become quite valuable and he was receiving substantial royalties from an oil and gas lease approved September 1, 1955. As of February 15, 1972, there was accumulated in decedent's Indian Money Account the sum of \$66,258.03 which sum for the most part represents oil royalties from decedent's half share in the allotment.

¹⁵ This file is designated *Appeal of Lena Bearskin First Sound*, IA-1668 (June 11, 1968).

¹⁶ The decision, in pertinent part, states: "There are significant intervening events in the present case which require disapproval of the deed. After the deed of December 1, 1954, was returned in 1955 without approval, the grantor made no attempt to fulfill the requirements made by the Area Director; in fact, the grantor appears to have rested on the statement made to him at that time that no further consideration would be given the deed since he made no further move looking to the conveyance of his interest to the appellant. Moreover, the deceased until his death in 1965 accepted as his own his share of oil and gas revenues from the allotment and included his interest in a specific devise in a will. In these circumstances, it cannot be said that the grantor manifested the necessary consent or 'continuing application' that the deed be approved. See *Bacher v. Patencio*, 232 F. Supp. 939 (D.C. S.D. Cal. 1964), *aff'd* 368 F.2d 1010 (9th Cir. 1966)."

¹⁷ The gist of the examiner's rationale, too lengthy to quote *in toto*, is as follows: "In the determination of this proceeding, the examiner is prone to consider the fact that the other half of the royalty which this decedent received before his death was unjust enrichment in view of the fact that he had fathered the child, never supported him, and had been frustrated in his deed attempt to make things right.

"Following the entry of this order, Lena will have no further opportunity to make any claim upon the royalties to be received by the devisees under the decedent's will from her son's land, and in view of the fact that she cared for the child, Charles First Sound, during the 25 years of his life, five years as an invalid with running sores on his leg, it would seem that the \$27,500.00 of royalty (decedent's one-half only) accumulated during probate, said royalty now being held in the IIM account, should properly be awarded to her under her claim.

"A finding is made that the claim of Lena First Sound shall be allowed in the amount of \$27,500.00. This is *in lieu of the claim for not only the full amount of all royalties received from the property, before and after decedent's death, but also the title to the minerals which this examiner is powerless to award.*

"The \$27,500.00 claim allowed to Lena First Sound shall be paid only from the royalty derived from the oil production from the lease on the lands of Charles First Sound, Allotment No. 3550." (*Italic supplied.*)

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Sound¹⁸ to divide the illegitimate's allotment equally between his father and his mother was correct. This is a fundamental proposition for if the half-interest in his son's allotment was improperly distributed to the decedent the estate of Charles First Sound should be reopened and such interest properly distributed according to the laws of descent and distribution governing the estates of illegitimate children in effect in Montana at that time.¹⁹

Let us now turn to this question.

B. The Correctness of the Examiner's Holding in the Estate of Charles First Sound.

As previously noted, the correctness of Examiner Graves' determination that the allotment of Charles

First Sound should be distributed to his father, Charles Track, and his mother, Lena First Sound, in equal shares has not been challenged in these proceedings by any of the parties.²⁰ Hence, in the probate proceedings in the instant case, the question was not before the examiner. Although the basis for Examiner Graves' decision does not appear in the formal documents in the Charles First Sound probate file, in a letter dated February 2, 1953, to Mrs. First Sound contained therein, Graves indicates that "under the laws of the state of Montana, the decedent's heirs are his mother and father, each taking a 1/2 share." Although we disagree with his interpretation thereof, we do believe that Examiner Graves properly referred to the Montana statutes to determine the heirs of Charles First Sound rather than to the federal statute pertaining to the inheritance rights of illegitimate children, *i.e.*, sec. 5 of the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. sec. 371 (1952), which provides that for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the subject Act, whenever any male and female Indian shall have cohabited together as husband and wife accord-

¹⁸ Examiner Graves entered his Order Determining Heirs therein on January 12, 1953.

¹⁹ Should it appear that the decedent was not entitled to share in his son's estate, this half-interest in the allotment should be deleted from the inventory of assets comprising his estate and the question of the validity of the examiner's allowance of the claim of Lena First Sound becomes moot since it appears that the true nature of her claim was for the other half of her son's allotment and the royalties accruing therefrom which had accumulated in the decedent's Indian Money Account. Whether a claim solely in the nature of a claim for non-support which was never reduced to judgment in a state court having jurisdiction to consider and determination liability therefor is recognizable in Indian probate proceedings is not before us. It would appear, however, that should it be determined upon reopening of the estate of Charles First Sound that the decedent herein was entitled to a half-share of his son's allotment, it would become necessary to remand this matter for further hearing to take further evidence as to the dollars and cents amount of such support and to allow the parties opportunity to present legal arguments as to the propriety of claims founded in equity in Indian probate proceedings.

²⁰ Nor was this question raised during the probate proceedings in *Estate of Charles First Sound*, Probate C-M-53 (File No. 1136) or in Lena First Sound's administrative appeal from the decision of the Commissioner of Indian Affairs denying approval of Charles Track's deed in *Appeal of Teno Bearskin First Sound*, IA-1668 (June 11, 1968).

ing to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose of aforesaid, taken and deemed to be the legitimate issue of the father of such a child.

This department has heretofore interpreted section 371 to create inheritance rights only in the illegitimate child, not in the father. Thus, the acting Solicitor, in *Estate of John Slickpoo*, IA-130 (February 28, 1955) held as follows:

* * * However, it is now well settled that the language of the 1891 Act to the effect that "every Indian child, otherwise illegitimate, shall for such purpose [of determining the descent of land] be taken and deemed to be the legitimate issue of the father of such child" bestows inheritance rights only upon the illegitimate child, and does not create a right of inheritance in the father. Thus, any claim which a father may make in such a situation is not aided by the above federal statute, but necessarily must depend upon the State law.

C. Construction of the Montana Statute.

The pertinent Montana statute in effect at the time of Charles First Sound's death, and at the present time, R.C.M. 1947, sec. 91-404, provides as follows:

Illegitimate children to inherit in certain events. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or

her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family, in which case such child and all the legitimate children are considered brother and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate: saving to the father and mother, respectively their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

The question then is whether, under the above-quoted statute, the father of an illegitimate has any rights in the illegitimate's estate. Since we have been unable to find any Montana cases which have construed the subject statute in the somewhat rare situation involved here where it is the father who seeks to obtain rights in his illegitimate child's estate, we must proceed without benefit of precedent.

Some preliminary observations should be made. First, the announced purpose of the statute, and we believe its primary purpose, is to provide for the rights of illegitimate children to inherit from their parents, and from their lineal or collateral kindred, and not vice versa. Second, the statute is in abrogation of the common law rule that upon the death of an illegitimate intestate his property will descend only to the heirs of his body, and in the absence of such a specific statutory provision conferring rights of

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inheritance neither the mother nor the father of an illegitimate has any right of inheritance from such child who dies intestate. 10 Am. Jur. 2d, *Bastards*, sec. 160 (1963). Thus in the absence of such specific statutory provisions the father of an illegitimate has no right to inherit upon the death of the illegitimate intestate. 10 Am. Jur. 2d *Bastards*, sec. 164 (1963); Annot., 48 A.L.R. 2d 759; *Estate of W. B. Harrison*, Myrick Prob., 121 (Calif. 1876). Finally, statutes of this kind are strictly construed, and the courts have indicated a marked reluctance to extend the right to inherit to persons not named therein. Annot., 48 A.L.R.2d 759.²¹

In view of the applicability of the rule of strict construction, it is significant that the Montana statute in question does not "expressly" provide for the father to inherit.²²

The structure of the statute in question, R.C.M. 1947, sec. 91-404, is worthy of comment. It breaks down into four parts: (1) The first section provides for the inheritance rights of an illegitimate child who has been acknowledged in writ-

ing by his father (2) The second clause provides that in all cases the illegitimate is an heir of his mother and (3) The third section provides that the illegitimate does not represent his father or mother for the purpose of inheriting from his or her lineal or collateral kindred unless before the illegitimate's death his parents have married, and his father after such marriage has acknowledged the illegitimate as his child or adopted the illegitimate into his family.²³ (4) The fourth part provides that the issue of all marriages null in law or dissolved by divorce are legitimate.

In accord with the foregoing, we view the statute as contemplating two means of "acknowledgment": (1) for the son to inherit from his father, a mere acknowledgment in writing signed by the father of the child is sufficient; (2) for the father to inherit from the illegitimate son, there must be a marriage between the father and the mother of the illegitimate followed by either an acknowledgment of paternity by the father of the illegitimate child,

²¹ From the nature of his remarks and the organization of his material, we gather that the author of the annotation believed, as we do, that the Montana statute should not be construed so as to provide for inheritance rights of the father of an illegitimate.

²² Another Montana statute does specifically provide that the mother is a successor to her illegitimate child. Thus, R.C.M. 1947 § 91-405 provides:

"If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law."

²³ At the end of the third section of the statute is this clause: "* * * saving to the father and mother respectively, their rights in the estates of all the children in like manner as if all had been legitimate * * *." We believe this language relates only to the third section, the effect of which is to predicate the inheritance rights of the father on the happening of either of the combined events: (1) marriage of the father and mother and acknowledgment of the illegitimate by the father after such marriage, or (2) marriage of the father and mother and adoption of the illegitimate by the father into the father's family.

or an adoption of the illegitimate into the father's family.

Under our interpretation, Charles Track was not entitled to inherit from his illegitimate son. He was never married to his son's mother nor did he adopt his son into his own family. From the record before us, it appears that the only acknowledgment during the lifetime of Charles First Sound was his oral testimony at the change of name hearing in the tribal court. Whether at this time the father executed an acknowledgment in writing is not shown.²⁴

In attempting to divine the meaning of the subject Montana statute we have had occasion to examine the statutes of other states having similar content, and in particular, the California statutes pertaining to "Succession" from which the Montana statute derived. Of particular significance is the North Dakota statute. Section 56.01.05 of the North Dakota Century Code (Vol. 11, 1960) provides as follows:

Every child born out of wedlock is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child. In all cases such child is an heir of his mother. He inherits the father's or mother's estate, in

whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. He, however, does not represent his father or mother by inheriting any part of the estate of the kindred of his father or mother, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage shall have acknowledged him as his child or adopted him into his family. In that case such child and all the legitimate children in such family are considered brothers and sisters and on the death of any one of them intestate and without issue the others, *subject to the rights in the estate of such deceased child of the father and mother, respectively, as is provided in this code*, inherit his estate as his heirs in the same manner as if all the children had been born in wedlock. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock. (Italics supplied.)

The authors of the North Dakota statute used periods in lieu of the confusing semicolons found in the Montana statute to separate the various sections comprising the paragraph. Thus, in the North Dakota statute, the important clause in which the inheritance rights of the father and mother are reserved is clearly linked to the section pertaining to the illegitimate's right to inherit from lineal or collateral kindred of his mother or father, and is clearly not connected to the other sections of the statute, and it is quite apparent that the rights of the father are not "saved" by his mere acknowledgment in writing that he is the father of such child. Indeed, it is questionable whether the father of an illegitimate can inherit under any set of circumstances under the North Dakota statute.

²⁴ If the decedent did execute an acknowledgment in writing during the lifetime of Charles First Sound it would make no difference to the ultimate conclusion reached here. So also, the affidavit executed by the decedent relinquishing any claim in his son's estate, executed shortly after his son's death, in our opinion is not an acknowledgment by the father of the illegitimate, since for such an acknowledgment to have any efficacy whatsoever it must surely occur during the lifetime of the illegitimate.

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The original California statute, the precursor of the Montana statute, was short lived. Under subsequently enacted California statutes the father is given no inheritance rights in the estate of his illegitimate child unless the child has been legitimated by a subsequent marriage of his parents or adopted by his father as provided by the civil code, and where such is not the case, the illegitimate's estate is succeeded to as if he had been born in lawful wedlock and had survived his father and all persons related to him through his father. *See* Cal. Prob. Code, § 256.

We have also referred to similar statutes in the states of Idaho and Utah which are couched in nearly identical language to the Montana statute and find that there have been no interpretations of these statutes inconsistent with the conclusions which we here reach.

We are constrained to conclude that there exists a strong probability that the decision reached by Examiner Graves which resulted in the decedent's receiving a half interest in his illegitimate son's allotment may be erroneous and that the foundation upon which the decisions of the Commissioner and other officials of this Department in repeatedly denying Lena First Sound's claim over the years is unsound. There is but one solution which will result in a just and equitable resolution of the claim of Lena First Sound in this instance—a reopening of the Estate of Charles First Sound. To

implement this determination, an order is being issued simultaneously herewith, in the exercise of the authority reserved to the Secretary in section 1.2 of Title 25 of the Code of Federal Regulations and pursuant to 43 CFR sec. 4.242(h), directing the reopening of the Estate of Charles First Sound, deceased Fort Peck Allottee No. 3550, Title Plant File No. 1136 (1953) with provision therein affording the parties hereto full opportunity to present evidence and legal argument material to the question herein discussed.

IV. CONCLUSION AND ORDER

Pursuant to the authority vested in this Board by virtue of its delegation from the Secretary, 35 F.R. 12081, 211 DM 13.7, the appeals of Edith Cooper and Joan Track Clampitt are denied and the Decision After Rehearing entered by the Secretary of the Interior on June 29, 1971, insofar as the matters raised by these appeals are concerned, is affirmed. The Secretary's decision affirming the Examiner's approval of the 1965 codicil and the 1958 will and directing distribution of decedent's estate according to the terms thereof, is affirmed in all respects with the exception, as hereinbefore noted, that the inclusion of the Charles First Sound allotment as part of the decedent's assets in these probate proceedings and the approval of the decedent's will, to the extent that it disposes

of such allotment, is the subject of an order for reopening in Estate of Charles First Sound being executed simultaneously herewith, and accordingly, as to that single asset, that part of the Secretary's decision must be held in abeyance pending the outcome of such reopening proceedings.

If, as a result of such proceedings, the half interest in the Charles First Sound allotment is found to be the property of Lena First Sound, a final order will be entered in the instant matter directing the removal of said property as an asset of Charles Tract's estate and closing these proceedings and directing the distribution of the property to Lena First Sound in accordance with the determination reached in the reopening proceedings.

If, on the other hand, it is determined upon the conclusion of the reopening proceedings that the half-interest in the Charles First Sound allotment was properly distributed to the decedent, Charles Tract, a final order will be entered herein supplementing such decision and directing the distribution of said property to the four grandchildren of decedent to whom the property was devised by Paragraph Fifteenth of the decedent's 1958 will.

In view of the fact that the fees of Sansaver and Larson, attorneys for Lena First Sound, were made payable out of the asset in controversy and may be subject to readjustment after conclusion of the reopening proceedings in Estate of

Charles First Sound, that part of the Secretary's decision and the Order Setting Attorney's Fees dated June 29, 1971, will be held in abeyance until the conclusion of the reopening proceedings at which time the Examiner conducting the reopening proceedings should make a combined determination of their fees for their services herein together with their services in the reopening proceedings. The \$1,500 fee allowed attorney James McCann for his efforts in the instance proceedings is hereby affirmed. In the respects specified, this decision is final for the Department.

MICHAEL A. LASHER,
Alternate Member.

I CONCUR:

DAVID DOANE, *Alternate Member.*

APPEAL OF UNIVERSAL ENGINEERED SYSTEMS, INC.

IBCA-900-4-71

Decided *March 16, 1972*

Appeal from Contract No. 14-06-D-6555; Solicitation No. (D) 88,528-A; Telemetry equipment for Phoenix Dispatcher's Office, Mead Substation and Hoover Powerplant; Pacific Northwest-Pacific Southwest Intertie; and Bureau of Reclamation.

Sustained.

Contracts: Performance or Default: Generally

The contracting officer's decision to partially terminate for default a supply con-

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tract by reason of defects alleged to exist in delivered equipment will be deemed improper where the equipment conforms to the contract requirements and the failure of the equipment to operate fully to the satisfaction of the Government is found to be caused by voltage variations in excess of specification limits.

Contracts: Disputes and Remedies: Termination for Default

Where the default termination decision is appealed and held to be improper, the Government is without contractual authority under the Default Article to charge excess costs to the contractor without regard to whether a later decision assessing excess costs was appealed.

APPEARANCES: For appellant, none; for the Government, Mr. William A. Perry, Department Counsel, Denver, Colorado.

Opinion By Mr. Lynch **INTERIOR BOARD OF CONTRACT APPEALS**

This timely appeal is taken from a partial default termination¹ of the above-referenced contract for furnishing telemetering equipment for the Phoenix Dispatcher's Office, Mead Substation and Hoover Powerplant locations of the Pacific Northwest-Pacific Southwest Intertie.

Neither party having requested an oral hearing, this appeal will be decided on the record.

The supply contract resulted from an advertised solicitation on

Standard Form 33, July 1966, entitled, "Solicitation, Offer and Award," and included Standard Form 32 (1964 Edition). Standard "Default" and "Termination for Convenience Articles" were included.² Under date of May 1, 1968, a notice of award (Standard Form 33) was forwarded to appellant with an executed purchase order of the same date.³ The contract called for delivery of three lots of load and frequency control and analog telemetering equipment, with one lot destined for each of the three locations (Phoenix, Mead and Hoover). Appellant was not required to install the equipment.⁴ Appellant was required to test the equipment prior to shipment under simulated conditions and to furnish the Government with certified copies of test data and reports.⁵

The total contract price was \$32,320. Inspection and acceptance by the Government were to take place at appellant's plant prior to shipment.⁶ The contract delivery date of October 30, 1968, was extended 157 days to April 5, 1969, and timely shipment of all items was made on March 11, 1969.⁷ Subsequently, Government personnel completed installation at the three locations between May 1, 1969, and June 6, 1969.⁸

² Provisions 11 and B-14, respectively.

³ Item 1.

⁴ Item 1, Paragraph B-1, Special Requirements.

⁵ Item 1, Paragraph C-17, Technical Requirements, General.

⁶ Item 1, Purchase Order No. (D) 88,528-A.

⁷ Government's Brief, Exhibit 12, p. 1.

⁸ Government's Brief, Exhibit 12.

¹ Item 26, Appeal File; Letter Findings and Notice of Partial Default dated March 9, 1971. (All item number references are to appeal file documents.)

A letter dated November 3, 1969,⁹ from the contracting officer to appellant first indicated the Government was experiencing difficulty in the operation of the equipment. Appellant was asked to send an engineer to the Phoenix office to correct the problem. Thereafter, until June 30, 1970, there was an exchange of correspondence relating to concerted efforts to eliminate an electrical interference in the RPA-68 pulse frequency to voltage converter (receiver). Several modifications to the RPA-68 receiver were made by appellant and tested by the Government with marginal improvements in results. Utilizing data from Government field testing of the modifications, appellant redesigned the RPA-68. Redesignating the equipment as the RPA-70, he submitted it for Government tests. The RPA-70 proved acceptable to the Government and appellant replaced all RPA-68's with the approved RPA-70 receiver in June of 1970.¹⁰

Meanwhile, another problem concerning "missed or gained pulses" ¹¹ in the transmitter equipment, the TAP-68, became the source of an ongoing complaint by the Government. This complaint finally resulted in the Government taking action to partially terminate the contract for default and to reprocure transmitters manufactured by another. When informed of the

TAP-68 difficulty by letter dated February 20, 1970, appellant undertook a laboratory study to determine the source of the problem.¹² On June 26, 1970,¹³ the contracting officer wrote respecting the TAP-68 problems:

Spikes on both the a-c supply and on the millivolt inputs seem to be the source of the trouble. These spikes are generated by various equipments at both Mead Substation and Hoover Powerplant. * * *

The letter went on to request an engineer to visit the field installations to analyze and correct the problems with the TAP-68. This oft-repeated request for an engineering visit to the field did not result in any visit; the appellant preferring to secure data from the field and to seek corrections in his plant.

Appellant's response, dated June 30, 1970,¹⁴ advised:

We have been in touch with your field people on the telemetry transmission difficulties. They have advised us that there are transients on the AC supply that are of such a character that they interfere with the operation of the TAP-68. These transients, they report, are also interfering with the operation of equipment other than the TAP-68. Furthermore steps are being taken to eliminate these transients. We believe this is the correct path to follow. * * *

On July 29, 1970,¹⁵ the contracting officer wrote that equipment manufactured by another had been substituted for the TAP-68 in the

⁹ Item 6.

¹⁰ Item 16, appellant's letter dated June 30, 1970, advising the RPA-70's had been shipped.

¹¹ Item 12, contracting officer's letter of February 20, 1970.

¹² Item 13.

¹³ Item 15.

¹⁴ Item 16.

¹⁵ Item 17.

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same circuits and the substituted equipment gave satisfactory operation. He further advised "we are continuing testing to determine whether the TAP-68 converters are deficient or not." Appellant's response of August 13, 1970,¹⁶ denied the TAP-68's were deficient, advising that the equipment had satisfactorily performed during pre-shipment testing with the specified a-c supply of $120V \pm 5$ percent and greater voltage variations. While appellant continued efforts to improve the performance of the TAP-68, he maintained the position that the fault was not in the equipment, but in the fact that:

* * * the voltage values of the incoming disturbances average 3 volts with maximums of 5 volts. These readings were taken with a recording oscillograph and have a value approximately 80 times that of the signal voltage.¹⁷

The Government continued to insist that the TAP-68's were deficient; but in a letter dated December 8, 1970, confirmed the disturbance voltage values given by appellant.¹⁸ On January 7, 1971,¹⁹ the contracting officer advised of a serious out of specification reading within 24 hours after calibration of the equipment. He advised that all deficiencies must be corrected within 30 days or the Government would partially default the contract. By letter dated February 2, 1971,²⁰ appellant

requested return of any equipment involved in the calibration shifts for immediate and careful study. On March 9, 1971, the contracting officer²¹ responded with his notification of partial default termination of the contract and advised that seven replacement transmitters were being purchased to replace the TAP-68's.

The issue confronted in this appeal is whether the TAP-68 equipment failed to meet specification requirements. Appellant contends that the TAP-68 did meet specification requirements and that the operational problems resulted from voltage variations in excess of the specification limits on the Government-furnished supply lines. Asserting that the TAP-68 was deficient in that it failed to operate properly, the Government relies upon the appellant's efforts over a 2-year period to correct the problems as an admission the equipment was defective. Pointing to the fact that the appellant timely appealed only the default termination and not the contracting officer's decision in July of 1971, assessing excess costs, the Government also asserts in its brief that the assessment of excess costs is not in issue in this appeal.

The Government argues that paragraph 5(d) of the Inspection Article of Standard Form 32, provides that the inspection in presence of the Government representative does not relieve appellant of his re-

¹⁶ Item 18.

¹⁷ Item 22, Appellant's letter dated December 1, 1970.

¹⁸ Item 23.

¹⁹ Item 24.

²⁰ Item 25.

²¹ Item 26.

sponsibility to correct the defective equipment. Paragraph 5(d) reads:

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet contract requirements *which may be discovered prior to acceptance*. Except as otherwise provided in this contract, *acceptance shall be conclusive* except as regards latent defects, fraud, or such gross mistakes as amount to fraud. (Italics added)

The only reference to acceptance contained in the purchase order is the following provision:

Inspection is *required* at the shipping point. After inspection and acceptance, please deliver the material * * *. (Italics in original)

The record does not contain any formal acceptance documents. However, the parties agree that the required inspection took place prior to shipment. There is no claim by the Government that the other prerequisite of shipment, *i.e.*, "acceptance" did not occur. Absent any allegation or evidence to the contrary, it is assumed that the contract terms were followed and acceptance did occur prior to shipment. Subsequently, the Government had only those rights that would avoid the conclusiveness of that acceptance, such as may be found in other provisions of the contract or the reserved rights "as regards latent defects, fraud, or such gross mistakes as amount to fraud."

Clause 7 of the Supplemental Terms and Conditions adds to the

terms of Paragraph (b) of the Inspection Article as follows:

7. INSPECTION. The following is added to Paragraph (b) of Clause No. 5 entitled "Inspection" of Standard Form 32.

If the correction of the supplies or equipment is required at the point of installation or delivery because of non-conformity with requirements of this contract, and limitations of time will not permit correction thereof by the contractor, the Government may nevertheless proceed with such necessary correction, after notice to the contractor, and charge to the contractor the cost of correcting the supplies or equipment. If any corrective work is performed by the Government with its own forces, the contractor shall reimburse the Government for its costs of labor and materials an appropriate allowance for the use of plant and equipment, and other expenditures which are directly assignable to the corrective work, plus 15 percent of such costs for Government inspection, supervision, and overhead. If corrective work is performed by a contractor, other than the supplier, and is paid for by the Government upon a cost reimbursement basis, the contractor under this contract shall reimburse the Government for such other contractor's costs which are directly assignable to the corrective work, as defined above for correction by Government forces, plus 15 percent of such cost for such contractor's overhead and profit, plus 15 percent of the total amount paid such contractor for Government inspection, supervision, and overhead. If corrective work is performed by a contractor, other than the supplier, and is paid for by the Government upon a lump-sum basis, the contractor under this contract shall reimburse to the Government the lump sum so paid, plus 15 percent for Government inspection, supervision, and overhead.

These added terms deal with methods by which correction after

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installation may be made by the Government or others with the costs thereof to be borne by the contractor. We note that this modification is to that portion of the Inspection Clause concerning the Government's rights prior to acceptance and that the modification does not define any category of defects for which appellant is responsible that would enlarge upon the exceptions made in Paragraph 5(d) of the Inspection Clause. Reading this added paragraph together with the rest of the contract, it can only have application to the correction of defects for which appellant is responsible. Had there been a conditional acceptance because of certain defects discovered during testing, or had a latent defect been discovered after installation, this paragraph may have become operative.

The Government also relies upon the following Paragraph A-3 to justify its actions:

A-3. Right to Operate and Use Unsatisfactory Materials or Equipment.

If, after installation, the operation or use of the materials or equipment proves to be unsatisfactory to the contracting officer, the Government shall have the right to operate and use such materials or equipment until they can be taken out of service, without injury to the Government, for correction of defects, errors, or omissions and/or for replacement of unsatisfactory equipment in whole or in part, if correction is unsuccessful or infeasible. Unless otherwise agreed upon in advance, the period of such operation or use, pending correction of defects, will not exceed 1 year.

Clearly, this provision contemplates that the operation and use of

the equipment, after installation, may prove the equipment to be "unsatisfactory" to the contracting officer. However, the purpose of the provision as disclosed by its title and the right reserved therein to the Government is to provide a safeguard against an unscheduled termination of the system operation for the correction of defects. The term "unsatisfactory equipment" appears to be used to describe equipment found after installation to require "correction of defects, errors or omissions," and not to add a requirement that the equipment shall operate to the satisfaction of the contracting officer. Any other interpretation seems unwarranted in the presence of detailed technical specifications in a simple supply contract. Having accepted the equipment after test and inspection at the appellant's plant, the right of the contracting officer to find, after installation, the equipment to be unsatisfactory must be limited by the prior act of acceptance. Only by inference does Paragraph A-3 deal with the contractor's post acceptance obligations. It does not expressly add to those obligations. Construing the provisions of Paragraph A-3 and Paragraph 5(d) of the Inspection Article together, we find that the defects referred to in Paragraph A-3 are those defects not discoverable by the methods of inspection customarily employed, i.e., those which survive the final acceptance.

While the Government has not specifically alleged that a latent de-

fect existed, we turn to a consideration of whether, in fact, any defect in the equipment is shown to have existed.

The March 9, 1971 letter, giving notice of the partial default termination action gave us as the basis for the action, the failure of the TAP-68 equipment to operate satisfactorily as required by Paragraph D-1.a of the Technical Requirements. The reference Paragraph D-1.a reads in pertinent part:

D-1. *General.*

a. Under this solicitation, the contractor shall furnish mounted and unmounted load and frequency control and telemetering equipment for the Parker-Davis Transmission System of Region 3. The equipment shall work satisfactorily with existing load and frequency control telemetering equipment which was purchased from Leeds and Northrup Company under Invitation No. DS-5963 and other invitations. * * *

That the Government was not content with the operation of the equipment is clear. However, it is less clear from the record in what respect, if any, the TAP-68 equipment failed to conform to the specifications. The record shows that the primary difficulty was that electrical disturbances were being impressed upon incoming signal circuits. Further, the source of these disturbances was traced to equipment not manufactured by Leeds and Northrup,²² and not a part of the Parker-Davis Transmission System. In a letter dated June 4, 1970, from the Parker-Davis project manager for the Bureau to his

chief engineer,²³ a detailed review of the problem is presented. Relevant excerpts of the project manager's statements are:

* * * We found that there are spikes on both the A.C. supply and on the millivolt inputs which cause the trouble. We tried an isolation transformer in the A.C. supply and capacitors on each millivolt lead, connected to the ground mat. * * *

* * * These spikes are generated by various items at both Mead Substation and Hoover Powerplant.

At Mead, we found the Xerox machine and alarm bells create the most spikes and at Hoover, the "code call" causes bad spiking. * * *

We found that one wire of the existing interconnected cable has more induced A.C. voltage on it than the Universal equipment can tolerate. * * *

On N8 T.C., which is on the Nevada side of the powerhouse, two control cable wires carry the millivolts to the control room. These wires have very little induced A.C. and the U.E.S. oscillator (TAP-68) operates fairly well; in fact, it is the most stable U.E.S. oscillator we have.

The specification called for the Government to furnish the power supply circuits.²⁴ Appellant was required to meet certain accuracy requirements under specified voltage variation conditions.²⁵ We find that

²³ Government's Brief, Exhibit 3.

²⁴ Paragraph C-8, Technical Requirements.

²⁵ "C-11. Telemetering Equipment, Accuracy and Speed of Response.

"a. Accuracy.—Each telemeter instrument, as required by this solicitation, shall have an overall guaranteed accuracy over its full operating range as stated below. The maximum error shall not be exceeded under the most adverse combination of voltage variations of plus or minus 5 percent, frequency variations of plus or minus 0.1 of one (1) cycle from 60 cycles, and ambient temperature variations of plus or minus 15° from 25°C. Each instrument shall hold its calibration so that recalibration will not be required at unduly short intervals, under normal and reasonable service to meet the foregoing accuracy limits. * * *

²² Government Responses to Interrogatories dated December 20, 1971.

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the equipment met these requirements. The appellant conducted the required pre-shipment testing with a Government representative present. The test reports are not in evidence; however, appellant's affirmation that such testing showed conformance to specifications is not challenged. The record shows that both parties recognized the problem to be excessive electrical disturbances on the supply line caused by equipment outside the transmission system. Appellant promptly denied the claim that the TAP-68 was deficient. He pointed out this external source of the problem, and thereafter his voluntary efforts to improve performance of the TAP-68 cannot be taken as an admission the equipment was defective.

Department counsel directs our attention to two cases, *William F. Klingensmith, Inc.*, IBCA-717-5-68 and IBCA-734-10-68 (May 4, 1971), 71-1 BCA par. 8842 and *Randam Electronics, Inc.*, ASBCA No. 9006 (April 27, 1964), 1964 BCA par. 4207, in which default terminations were found to be proper. The cited cases involved a rejection of the supplies or contract work, however, for failure to comply with a specific contract requirement. In the instant case, the Government has not pointed out, nor is the Board able to find, any specific contract requirement that appellant's equipment failed to meet.

Appellant was required to design and manufacture his equipment so that it would work satisfactorily with other equipment in the trans-

mission system, namely, the Leeds and Northrup components. Presumably, the specification data on these components was available to appellant to permit him to comply with the standard.²⁶ However, the specifications do not state the extent to which unwanted electrical noise must be suppressed or screened out except that certain accuracies must be maintained at ± 5 percent voltage variations. It is apparent that data concerning the disturbances from the Xerox machine, code call and alarm bells was not known to either party until this problem arose and measurements were then made to facilitate correction.

The standard of performance required of appellant by his supply contract was to manufacture and deliver specially designed equipment in conformance to the specifications. The evidence indicates that the specification criteria for maintaining accuracy under voltage variation limits were less than the voltage variations present and induced in appellant's equipment from equipment outside the transmission system. There is no evidence that the system operation was deficient because of an incompatibility between other components and appellant's equipment.

The contention is raised that there is an inherent design requirement for equipment destined for

²⁶ Appellant's comments on Government Responses to Interrogatories dated January 15, 1972, attached Leeds & Northrup drawing for one component, a thermal converter.

powerplant environments to overcome electrical noise, frequency and voltage variations typically found there.²⁷ In the presence of an express contract provision such as is present here respecting voltage variations to be accommodated, no greater requirement can be read into the contract when conformance to the contract standard does not yield the desired result.²⁸

Additionally, little weight is given to the fact that the Government achieved satisfactory operation by substituting for the TAP-68, equipment manufactured by another. There is no showing that the other equipment was manufactured to the same specifications.

With reference to the calibration shifts complained of in the Government's letter dated January 7, 1971, it is noted that a single instance of a failure to hold calibration occurring some 22 months after delivery is not persuasive of the equipment being deficient with respect to the specification requirement not to require recalibration at unduly short intervals. We find that no defect for which appellant is responsible has been shown to be present in the TAP-68.

Appellant did not fail to deliver conforming supplies.

²⁷ Item 19.

²⁸ *United and Globe Rubber Manufacturing Companies v. United States*, 51 Ct. Cl. 238, 249 (1916). ("* * * and if he discharges his obligation by meeting the express conditions of the contract, and delivers the articles he agrees to deliver, no liability attaches because in the end it may not in all respects meet fully the anticipations of those engaged in its use. * * *")

Having found the termination for default to be improper, it necessarily follows that the Government is without any contractual right to charge appellant the resulting excess costs.²⁹

Conclusion

The appeal is sustained.

RUSSEL C. LYNCH, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.
SPENCER T. NISSEN, *Member*.

²⁹ *El-Tronics, Inc.*, ASBCA No. 5457 (February 28, 1961), 61-1 BCA par. 2961:

"* * * it follows that an appeal by Appellant from the default termination is broad enough to cover any subsequent action by the Government in the exercise of its rights or remedies under the Default Article." See also *Brook Labs Co., Inc.*, ASBCA No. 8266 (December 18, 1962), 1962 BCA par. 3624.

GATEWAY COAL COMPANY

1 IBMA 82*

Decided *March 16, 1972*

This is a decision on a cross-appeal filed by the Bureau of Mines challenging the legal and factual tests upon which a restraining order was issued by Malcolm P. Littlefield, Departmental Hearing Examiner. The order restrained the Bureau from enforcing against the Gateway Coal Company the mandatory safety

*The appeal and cross-appeal filed in this proceeding were originally consolidated as Appeal No. IBMA 72-6. In view of the fact that the cross-appeal is now treated by the Board separately, it has been assigned a new appeal number for clarity.

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standard which was the subject of Gateway's pending Petition for Modification. This decision is on the cross-appeal only and does not decide the issues involved in the appeal by Gateway from the Examiner's denial of the relief sought by the Petition for Modification. Having been advised that the parties are engaged in discussions which may result in a settlement on the merits of that Petition, the Board reserves decision on that part of this case.

Decision of the Hearing Examiner, in issuing the Restraining Order, AFFIRMED. Restraining Order CONTINUED. Application for Review, Docket No. PITT 72-210, DISMISSED.

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Interim Relief

The discretion of an examiner or the Board to grant interim relief, pending adjudication of a section 301(c) petition for modification, may be exercised only after a hearing has been afforded the parties, and it clearly appears: (1) that the petition has been filed in good faith; (2) that during the interim, the health and safety of the miners will be reasonably assured; and (3) that the operator will suffer irreparable harm if the interim relief is not granted.

APPEARANCES: Daniel R. Minnick, Esq., for Gateway Coal Company; Bernard M. Bordenick, Esq., for U.S. Bureau of Mines

Opinion by Mr. Doane

**INTERIOR BOARD OF
MINE OPERATIONS
APPEALS**

FACTUAL BACKGROUND

On September 17, 1970,¹ Gateway Coal Company (Gateway) filed, pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969 (the Act),² a petition for modification of the application of the mandatory fire protection safety standards to its Gateway Mine. The Petition dealt with several fire safety requirements under section 311 of the Act, including the requirement for automatic, overhead sprays at each of the belt drives on the belt haulage system.³

While this Petition was pending before a hearing examiner, the Bureau of Mines (Bureau) twice inspected the Gateway Mine and issued Notices of Violation for not having the above-described sprays on two of the belt drives. After several extensions of time for abatement were granted, the Bureau required Gateway to abate the violations cited on or before May 3, 1971. Although a hearing on the Petition had been held, it appeared improbable that a decision would be reached by the date set for abatement.

Confronted with the dilemma of having its Petition for Modification rendered useless by complying with

¹ The Petition for Modification was originally received in May 1970, but was not accepted for filing until proof of service on the Bureau and the representative of miners had been received.

² All references to the Act are to P.L. 91-173, 83 Stat. 742-804. The Act is also codified in 30 U.S.C. §§ 801-960 (1970).

³ The Act § 311(f); See also 30 CFR 75.1101 to 75.1101-22.

the abatement requirement of the Notices or having its men withdrawn from the mine pursuant to the provisions of section 104(b) of the Act, Gateway filed an Application for Review of the notices under section 105. At a hearing on the Application for Review, Gateway moved the examiner to exercise his implied power under section 301(c) of the Act to grant interim relief and restrain the Bureau from taking action on the two Notices or any other enforcement action which would interfere with the relief requested in the Petition for Modification.

The Bureau and Gateway agreed that the power to issue a restraining order was implicit in the provisions of section 301(c). They did not agree on the criteria to be met before the relief could be granted. The Bureau maintained that the criteria should be those set forth in the temporary relief provisions of sections 105(d) and 106(c) of the Act: a hearing; a showing of a substantial likelihood that the applicant will prevail on the merits; and a showing of no adverse effect on the health and safety of the miners in the mine. If these were applied, the Bureau argued, Gateway would not be entitled to interim relief. Gateway maintained that it was sufficient to show that its Petition for Modification was filed in good faith, that there was no imminent danger to the miners, and that these having been shown, it should be granted the interim relief sought.

In two Orders, issued April 30

and May 28, 1971,⁴ the Examiner restrained the Bureau from enforcing sections 311(f) and 311(g) of the Act and the regulations thereunder against Gateway until an initial decision was rendered on the merits of the Petition for Modification.⁵ In issuing the Restraining Orders, the Examiner found that Congress left the exercise of the power implied under section 301(c) to the discretion of the Secretary and his delegates. The Examiner concluded that it was proper to grant the interim relief because a hearing had been held; there was a showing of no imminent danger to the miners; the petition was filed in good faith by the operator; and there was potential irreparable damage to the operator unless the status quo of the parties was maintained pending determination on the merits of the Petition for Modification.

Gateway's Petition for Modification was denied by the Examiner October 15, 1971. Gateway then appealed the Examiner's decision to the Board and requested that the restraining order be continued pending decision by the Board on the Petition. The Board ruled that, under 43 CFR 4.594, the appeal filed by Gateway stayed the termination

⁴ The May 28 Order was issued upon reconsideration of the April 30 Order and modified the April 30 Order by specifying the standards which the Bureau was restrained from enforcing.

⁵ The Examiner also ruled when he issued the Restraining Order, that it was unnecessary to decide the Application for Review, and no disposition has been made of that proceeding.

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of the Examiner's Orders and thereby preserved the status quo of the parties.

The Bureau filed a cross-appeal with respect to the issuance of the Restraining Orders by the Examiner, alleging, " * * * that the Examiner did not apply the proper legal and factual tests in determining whether or not to grant a stay of enforcement as to sections 311(f) and 311(g) and the implementing regulations," and for consistency, the Board should apply the standards set out in sections 105(d) and 106(c) and reverse the Examiner.

On appeal Gateway contends that: (1) Congress could not have intended application of section 105(d) and section 106(c) criteria for interim relief under section 301(c) or it would have so provided; (2) that the purpose of those sections is to insure compliance with the safety regulations, while the purpose of section 301(c) is to determine whether the operator may be permitted to not comply; (3) that Congress intended that the relief provided for in section 301(c) be applied with equity; (4) that there should be no requirement of a finding of likelihood of success on the merits since a time-consuming technical presentation would be required; (5) that a finding of likelihood of success amounts to a finding of good faith on the part of the operator; (6) that if the Board were to adopt the criteria advocated by the Bureau, Gateway has met them, and that relief could still

properly be granted under section 105.

ISSUE INVOLVED IN THIS CROSS-APPEAL

What criteria should govern the exercise of discretion by an examiner or the Board in deciding to restrain or not restrain the issuance or enforcement of notices of violation relating to the mandatory safety standard which is the subject of a pending petition for modification under section 301(c) of the Act?

DECISION

The purpose of section 301(c) of the Act is to enable an operator to seek modification of the application of a mandatory safety standard to a mine.⁶ In contrast, the purpose of section 104(b) is to enforce compliance with the mandatory standard.⁷ If possible, the Act should be

⁶ Section 301(c) of the Act, in pertinent part, provides:

"Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine." * * *

⁷ Section 104(b) directs authorized representatives of the Secretary to issue a notice of violation whenever they find a violation of mandatory health and safety standards, and, thereupon, to fix a reasonable time for abatement of the violation. The section also provides that if upon expiration of the time fixed for abatement the violation has not been abated and the time should not be further extended, the miners shall be withdrawn from the mine until the violation has been abated.

construed to give meaning to both sections. Thus, while the merits of a petition for modification are being adjudicated, an operator should not be subjected arbitrarily to the abatement and mine closure provisions of section 104(b), if the notices of violation involved pertain to the same safety standard which is sought to be modified by the section 301(c) petition.

In this proceeding both parties and the Examiner concluded that Departmental hearing examiners and the Board, as delegates of the Secretary, have implied authority under section 301(c) to grant interim relief to an operator while the administrative adjudication of his petition is pending.⁸ We affirm that conclusion under the general principle of law that where the end is required the appropriate means are given and that every grant of power carries with it the use of necessary and lawful means for its effective execution.⁹

The specific issue before us on this cross-appeal, however, is what criteria should be applied in granting or denying such interim relief.

We see no reason to depart materially from the equitable factors which have traditionally guided the discretion of the courts in granting or denying injunctive relief. These include: whether the court has equity jurisdiction to determine the issues; benefit to the plaintiff if in-

junctive relief is granted and hardship if relief is denied; hardship on the defendant if injunctive relief is granted; good faith of the parties; hardship on third persons; convenience and effectiveness of administration; and public and social consequences.¹⁰

The use of these factors for our purpose requires that they be adapted to fit the circumstances arising from a pending proceeding under section 301(c). Therefore, we hold that, before granting interim relief, by restraining the Bureau from enforcement action under section 104(b) of the Act relating to the safety standard which is the subject of a pending petition for modification under section 301(c), an opportunity for hearing must be afforded the parties on whether the interim relief should be granted and a clear showing must be made that:

(1) The operator has filed a petition in good faith seeking modification of the application of a safety standard to a mine, and is not using the proceeding solely to postpone or avoid abatement;

(2) During the period of restraint, protection of the health and safety of the miners will be reasonably assured; and

(3) The operator will suffer irreparable harm if the requested interim relief is not granted.

We reject the Bureau's argument that a showing of substantial likelihood of success should be required. To do so would compel a lengthy hearing on the primary issue involved in the main proceeding for

⁸ See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *National Air Carrier Ass'n. v. CAB*, 436 F.2d 185, 190-91 (1970).

⁹ *American Trucking Ass'ns., Inc. v. United States*, 344 U.S. 298 (1953).

¹⁰ See J. Moore, *Federal Practice* par. 65.18 (3) (2d ed. 1971).

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modification; and a grant or denial of the motion for interim relief could become, thereby, a premature decision on the merits of the petition.

Although we see no particular harm in finding a lack of imminent danger in a mine before granting interim relief, we do not believe that such a finding should be required. There is no discretion to grant interim relief when imminent danger is present. The primary purpose of the Act makes it clear that no irreparable harm to the operator can offset the jeopardy to the health and safety of the miners created by an imminent danger situation. If there is imminent danger, the Bureau is required forthwith to issue a section 104(a) withdrawal order. An interim relief proceeding cannot be allowed to interfere with the issuance of a withdrawal order for imminent danger. Therefore, a negative finding by the examiner of no imminent danger, as a condition precedent to granting interim relief, would serve no useful purpose.

However, in issuing any restraining order, the examiner should be sure, and the Bureau should understand, that such order will not have the effect of restricting regular inspections of the mine or preventing the proper issuance or enforcement of notices of violation unrelated to the safety standard involved in the petition for modification. Furthermore, we would expect the Bureau, in the course of its regular inspections during the interim period, to be especially alert toward any de-

velopment of imminent danger arising from noncompliance with the safety standard sought to be modified, and to act appropriately.

Our review of the record in this case convinces us that the Examiner, after holding two hearings, found that the above required criteria, and more, were met before issuing the restraining order challenged by the Bureau. We therefore affirm the issuance of the Order as a proper exercise of his discretion.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (211 DM 13.6; 35 F.R. 12081), IT IS HEREBY ORDERED:

(1) That the DECISION of the Examiner in issuing the Restraining Order on April 30, 1971, as modified by the decision and Restraining Order, dated May 28, 1971, IS AFFIRMED;

(2) That the RESTRAINING ORDER issued by the Examiner on May 28, 1971, IS CONTINUED, until further order of the Board; and

(3) That the APPLICATION FOR REVIEW (Docket No. PITT 72-210) IS DISMISSED.

DAVID DOANE, *Member.*

WE CONCUR:

C. E. ROGERS, JR., *Chairman.*

DANIEL HARRIS, *Alternate Member.*

ESTATE OF LUCY HOPE DEEPWATER (DECEASED SHOSHONE-FLATHEAD ALLOTTEE 1234 PROBATE NO. F-12-71)

1 IBIA 241

Decided *March 17, 1972*

Order denying petition for reconsideration.

130.5 Indian Probate: Appeal: Reconsideration

Ordinarily, a decision on appeal by the Board of Indian Appeals becomes a final Departmental decision and upon the issuance of such decision the parties are deemed to have exhausted their administrative remedies.

365.0 Indian Probate: Reconsideration: Generally

Reconsideration of a decision on appeal will not be granted except upon a showing of manifest error in such decision.

370.1 Indian Probate: Rehearing: Pleading, Timely Filing

Only the Secretary of the Interior has the authority to waive or make exceptions to the regulations setting forth time limitations for filing pleadings and, with the exception of the Board of Indian Appeals to whom he has delegated such authority, personnel of the Bureau of Indian Affairs and other employees of the Department of the Interior have no authority to waive such regulations, whether done intentionally, or inadvertently by rendering erroneous advice to a party who acts on the same to his prejudice.

Opinion By Mr. Lasher

**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes on for reconsideration upon the filing by the ap-

pellant, Daniel B. Evening, Sr., of a document entitled "Appeal" by which the appellant seeks to have this Board reconsider its decision entered herein (*Estate of Lucy Hope Deepwater*, 1 IBIA 201, 78 I.D. 355 (1971)), in which we affirmed the hearing examiner's Order Denying Petition For Rehearing. The primary basis for our decision was that appellant's petition for rehearing was untimely since it was filed with the examiner after the expiration of the 60-day period of limitation set forth in the applicable regulation, 25 CFR sec. 15.17(a).¹ We also held that the examiner had no authority to waive the regulation.

In his request for reconsideration, the appellant alleges that an employee of the Bureau of Indian Affairs mistakenly advised him as to the last date upon which he could timely file his petition for rehearing. This allegation is supported by documentation attached to the petition, including an affidavit from the employee involved. However, even assuming *arguendo* that this contention is true it is to no avail. Personnel of the Bureau of Indian Affairs, and for that matter, other employees of the Department of the Interior, have no authority to waive the regulations, whether done intentionally, or inadvertently by rendering erroneous advice to a party who acts thereon to his prejudice. Only the Secretary and his delegatee, this

¹ This limitation now appears in 43 CFR sec. 4.241(a).

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Board, has this authority. *Estate of Jack Fighter*, 71 I.D. 203 (1964). *Estate of Samuel Picknoll*, 1 IBIA 168, 78 I.D. 325 (1971).

Furthermore, although this Board has inherent power to rectify manifest error in its decisions, the regulations do not provide for reconsideration of our final decisions. *Estate of George Minkey* (Supp.), 1 IBIA 56 (December 29, 1970). There is some authority for the proposition that in the absence of statutory authority therefor, quasi-judicial decisions such as those rendered by this Board are not a proper subject for reconsideration, 73 C.J.S., *Public Administration Bodies and Procedure*, § 156(a) (1951), and we have previously applied this rule where the circumstances warranted it. *Estate of Julius Benter*, 1 IBIA 59 (January 12, 1971).

In any event, there is no showing of manifest error in our original decision. Indeed, in reaching such decision, we had occasion to examine the substantive merits of the allegations of the appellant and made the following observation in regard thereto:

*** On the basis of the record before us we are unable to ascertain any truly compelling reason justifying an exception to the regulations. We have carefully reviewed the record and find that there is ample support therein for the examiner's decision to approve the will and direct distribution of the decedent's estate according to its terms. Moreover, the evidence submitted by the appellant in support of his appeal is both vague and conclusory in nature and has neither the quality or content which we find persuasive.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.7; 35 F.R. 12081), the petition for reconsideration of Daniel B. Evening, Sr., is denied and our original decision entered herein on December 16, 1971, is affirmed. Since more than 60 days have elapsed since the issuance of our original decision herein, distribution of the decedent's estate should be made forthwith in accordance with the provisions of 43 CFR sec. 4.296. This decision is final for the Department.

MICHAEL A. LASHER, JR.

Alternate Board Member.

I CONCUR:

DAVID J. MCKEE, *Chairman.*

UNITED STATES v. CHARLES MAHER ET AL.

5 IBIA 209

Decided March 21, 1972

Appeal from decision (Idaho 1-68-1 *et al.*) by Office of Appeals and Hearings, Bureau of Land Management, affirming hearing examiner's decision as modified.

Affirmed as modified.

Administrative Procedure: Adjudication—Administrative Procedure: Generally—Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Apportionment of Federal Range

A decision of a district manager which is arbitrary or capricious will not be sus-

tained, when challenged by one who has standing, even in the absence of any evidence of serious economic impact. To that extent, *National Livestock Company and Zack Cox*, I.G.D. 55 (1938), is overruled.

A decision involving the exercise of administrative discretion, which is supportable on any rational basis, is not arbitrary or capricious. An apportionment of the federal range, involving some abolition of "split-use" between states and based upon the effectuation of a management plan reasonably related to the protection of forage and other values, has, therefore, a rational basis and is not arbitrary or capricious.

Grazing Permits and Licenses: Apportionment of Federal Range: Grazing Permits and Licenses: Cancellation and Reductions

Elimination of a range user's so-called "split use" between two grazing districts by consolidation of his grazing privileges in a particular grazing district is reasonably incident to formulation and implementation of grazing management programs by the Bureau of Land Management and will be permitted to stand absent severe economic impact on the parties affected thereby.

Grazing Permits and Licenses: Apportionment of Federal Range—Grazing Permits and Licenses: Appeals

The economic effect of the transfer, reduction or other change in grazing privileges of a particular range user is but one factor to be considered by the Board of Land Appeals in determining if a decision appealed from is unreasonable or should otherwise be reversed or modified.

APPEARANCES: Leon R. Weeks of Weeks & Davis for the appellants; Riley C. Nichols, Attorney, Solicitor's Office, Department of the Interior, for the appellee.

Opinion By Mr. Fishman

INTERIOR BOARD OF LAND APPEALS

The appellants herein, Charles Maher, Carol MacIver, and L. Franklin Mader, have appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated August 5, 1969, affirming with modifications the decision of a hearing examiner, dated February 20, 1969. The hearing examiner's decision dismissed appeals from a joint decision of the district managers in Vale District in Oregon, and the Boise District in Idaho, dated February 2, 1968. The hearing was held in Vale, Oregon, on July 8 and 9, 1968.

The joint decision of the district managers transferred the active grazing privileges of MacIver (231 AUMs) and Mader (970 AUMs) from Oregon to Idaho and the active grazing privileges of Maher (154 AUMs) and several others¹ from Idaho to Oregon for the stated reason of producing proper range management and the orderly administration of the federal range. In

¹ As noted in the decision of the Office of Appeals and Hearings, two of the others affected by the joint decision, the Greeley Ranch and Duncan and Elaire MacKenzie, joined the other appellants in submitting a notice of intention to appeal from the hearing examiner's decision, but failed to perfect their appeal within the 30-day period prescribed in 43 CFR 1853.7(b). Greeley Ranch and Duncan and Elaire MacKenzie have not appealed the dismissal of their appeals by the Office of Appeals and Hearings.

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dismissing the five appeals the hearing examiner found that the appellants all have base lands in Oregon near or along the Oregon-Idaho border and that one of the reasons appellants had been allowed to exercise their grazing privileges in both the Vale District and the Boise District in the past was that prior to 1960 there was no fence along the border separating the two districts. The joint decision required the appellants to consolidate their privileges in one state, but did not reduce the number of privileges of any of the appellants.

The appeal asserts that the decisions below: (1) misconstrued the applicable law; (2) erred in determining the issue in the matter; (3) erred in the meaning of "arbitrary and capricious"; (4) made findings of fact not supported by the evidence; (5) incorporated conclusions contrary to law; (6) erred in determining that precedential administrative decisions must be followed; (7) are contrary to the facts and law; (8) failed to make findings on crucial questions of fact; (9) are arbitrary and capricious; and (10) erred in failing to find that the joint decision of the district managers was arbitrary and capricious.

The key issue² before us was stipulated to by the parties at the

hearing and is of the same genre as that in the *National Livestock* case,³ i.e., whether in shifting the appellants' area of use from one state to another, the district managers acted arbitrarily or capriciously or displayed a lack of good range management so as to seriously impair the appellants' operations from an economic standpoint.⁴

The hearing examiner, applying the rule of *National Livestock*, determined that there was no evidence in the record that the new grazing areas assigned to the respective appellants would seriously endanger the possibility of their continuance in the livestock business and render valueless their privately owned land and improvements.

He also found that appellants failed to establish that the district managers' decision was arbitrary or capricious.

The wisdom of the *National Livestock* rule has been questioned, not only by appellants herein, but also

the reduction in federal range privileges of each respective appellant creates an excessive economic and management problem to their respective ranches, which will cause their continued operation to be prohibitive, both from a range management standpoint and economic standpoint. That a fourth issue is that the shift of the grazing privileges of the respective appellants is without due compensation. The fifth issue is that the shift of the grazing privileges of the respective ranches of the appellants deprives them of their proportionate share of the allowable carrying capacity within the respective grazing units." Tr. 13, 14.

³ *National Livestock Company and Zack Cow*, I.G.D. 55 (1938).

⁴ The record, Tr. 18-19, shows that appellants' attorney stated, "I would stipulate that that is the issue."

² At the hearing, appellants' counsel, agreed to that issue but not as the sole issue. He suggested the following:

"Another of the issues is that the shift of the grazing privileges in each respective appellant's case does not take into consideration the good range management practices of both the federal range involved and the privately owned lands, and in addition, the third issue, that

by the Office of Appeals and Hearings. The rule is stated at page 60:

Plainly, then, the determination of the particular area in which the grazing is to be permitted is a matter committed solely to the discretion of the Department, and no permittee can, as a matter of right, be heard to complain if the lands upon which he is permitted to graze are different from those which he has used in the past. Such a complaint could only be entertained upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land and improvements of the operator adjacent to the grazing district and seriously endanger the possibility of his continuance of the livestock business. (*Red Canyon Sheep Company et al. v. Ickes*, decided May 27, 1938, F. (2d) 308.) [D.C. Cir.].

The Office of Appeals and Hearings, in its decision of August 5, 1969, although affirming the result reached by the hearing examiner, agreed with appellants that a decision which is arbitrary or capricious and is adverse in its effect on a licensee would be subject to reversal, *National Livestock* notwithstanding. Appellants correctly argue that it is not necessary to show serious economic detriment where the decision is in fact arbitrary or capricious. On the other hand, the Bureau of Land Management, while conceding that *National Livestock* imposes a heavy burden of proof on the licensee by requiring him to show not only that a decision is arbitrary or capricious but also that it will render his base lands valueless and jeopardize his continuance in the livestock business, argues that such a rule is necessary to prevent

the continual frustration of management programs designed to simultaneously conserve the range and achieve equitable apportionment of its use among various users.

Part of the confusion surrounding the *National Livestock* rule lies on its unfortunate linking of two separate and distinct concepts, i.e., the concept of "arbitrary and capricious" administrative action, with the rule "commonly recognize[d] that the right to carry on a business without illegal interference causing irreparable damage is the subject of equitable protection by injunction." *Red Canyon Sheep Company v. Ickes*, 98 F. 2d 308, 317 (D.C. Cir. 1938).

In considering the true meaning of *National Livestock* it is helpful to separate these two doctrines. Initially, we note that the phrase "render valueless the privately owned land" originated in *Red Canyon Sheep Co. v. Ickes*, *supra*, which was cited in *National Livestock* as authority for the contested rule. In *Red Canyon Sheep Co.*, *supra*, the bill of complaint filed in the United States District Court for the District of Columbia alleged as a foundation for the equitable relief sought, that the appellants' privately owned land and improvements thereon adjacent to the grazing district would become valueless. The appellees moved to dismiss the bill upon the grounds that the appellants lacked a sufficient interest to maintain the suit in that they did not have a vested interest in the lands in question. The court found

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that the appellants' rights were of sufficient dignity to be entitled to equitable protection and remedies. Thus the phrase "render valueless, etc.," had relevance only as one test of whether one seeking to enforce equitable remedies in court may be successful.

In essence, in this context *Red Canyon* focuses on the availability of equitable relief by way of injunction. That decision does not stand for the proposition that other remedies would not be available in the absence of "irreparable damage" to the person aggrieved.

The oft-quoted *National Livestock* rule, if read literally, establishes a cause and effect relationship between two unrelated concepts. Thus, the rule states that the decision must be "so arbitrary or capricious as to render valueless the privately owned land, etc.," in order for the "complaint" to be entertained. This is obviously not a proper rule to govern the rights of a party seeking to obtain administrative relief from an adverse decision. Nor is it reasonable, in view of the rule's patently confused rationale, to construe it as having been intended to set forth boundaries or restrictions as to the scope of review afforded an appellant seeking administrative review of an adverse decision. Our review is not limited to determining simply whether administrative action at the lower level is unreasonable, arbitrary or capricious. Nor are we restricted to modifying or reversing unwise or erroneous deci-

sions only where a licensee will be put out of business.

This view is consonant with *Joyce Livestock Company*, 2 IBLA 322, 327 (June 2, 1971), in which we said:

As to the effect upon the individual range user a rule has been enunciated, as pointed out by the hearing examiner, that the allocation will be upheld unless it is shown that the user's privately-owned land is rendered valueless and the possibility of its continuation in the livestock business is seriously endangered. *National Livestock Company et al., supra*. However, in *Ball Brothers Sheep Company et al.*, 2IBLA 166 (1971), a less rigorous standard was applied; i.e., that an allocation will not be disturbed where its implementation will not result in such hardship as to constitute a serious impairment of the grazing user's livestock operation. Appellant showed by testimony of Hugh Nettleton, president of the company, only that the purchase price for the Shelley properties was based upon an expectation of use in area 6-B. Nevertheless, the evidence failed to show that the privately-owned land could not be used (although not quite as intended) or that appellant's livestock operation would be seriously impaired. Thus, even the *Ball Brothers Sheep Company* test has not been met; *a fortiori*, the more difficult test of *National Livestock Company* has not been met.

The point need not be belabored that an administrative action which is arbitrary or capricious may be challenged successfully by one who has standing. See *Shields et al. v. Utah Idaho R.R. Co.*, 305 U.S. 177, 185 (1938). An action in the exercise of administrative discretion may be regarded as arbitrary or capricious only where it is not sup-

portable on any rational basis. The fact that a court reviewing a decision supported by a rational basis could have reached a contrary decision does not make the action arbitrary or capricious. *Carlisle Paper Box Co. v. NLRB*, 398 F. 2d 1, 6 (3d Cir. 1968).

"The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body [structure of rate schedule]." *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-287 (1934).

In the light of the foregoing, it seems clear that if an action of a district manager has a rational basis, it is not arbitrary or capricious. An action of such an official which is reasonably related to protection of the range, i.e., forage and other values or prevention of use by non-authorized parties, has a rational basis and is, therefore, not arbitrary or capricious.

But we also agree with the position of the district managers that a stringent burden of proof on the appellant is necessary to prevent frustration of beneficial range management programs. We believe this was the objective of the *National Livestock* principle, even though not clearly stated. It is settled law in this field that the range user has no right as a matter of law to demand that his license or permit shall confer grazing privileges in any particular part of a grazing district. See *Redd Ranches*, A-30560 (July 27, 1966); *Harold Babcock et al.*,

A-30301 (June 16, 1965). His is not a vested right to the continued use of the land embraced in his permit or lease. *Dr. and Mrs. A. J. Kafka*, A-29807 (February 3, 1964). The burden is upon the licensee to show by substantial evidence that the decision is improper. *E. L. Cord d/b/a El Jiggs Ranch*, 64 I.D. 232 (1957). The determination of the range to be used is a matter entirely within the discretion of the Department. *R. B. Hackler*, I.G.D. 274 (1942). Yet any party affected by a decision which is arbitrary or capricious has, as a matter of right, the opportunity to obtain redress.

Therefore, to the extent that *National Livestock* limits the right to or scope of review in holding that "such a complaint could be entertained only upon allegation that the determination was so arbitrary or capricious as to render valueless the privately owned land * * *", that decision is overruled. On the other hand, we agree with the language contained in the same decision to the effect that should it become necessary in the interest of good administration or in carrying out the stated purposes of the Taylor Grazing Act, 43 U.S.C. sec. 315 *et seq.* (1970), the discretion of the Bureau is of such magnitude that it would be permissible and proper even to close any given area to grazing for so long a period as might be determined to be desirable, even though a licensee or permittee were thus deprived of all grazing privileges which he previously enjoyed. So also, in an appropriate case, the

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Bureau may, in the reasonable exercise of its discretion, reduce or cancel the privileges formerly enjoyed by a particular licensee. *Alice and L. A. Matter*, I.G.D. 296 (1942); *United States v. John W. Nicoll*, 4 IBLA 333 (February 14, 1972).

We do not share the belief expressed by the Office of Appeals and Hearings in its decision of August 5, 1969, that a decision, even though reasonable, which renders valueless the base lands of an appellant, is necessarily in contravention of the Taylor Grazing Act. For example, upon the happening of extraordinary or catastrophic circumstances, such as fire, flood, war, drought, or pestilence, sound administration of the Taylor Grazing Act might dictate the suspension or elimination of all privileges formerly enjoyed by a licensee. See for example, *H. D. Mollohan and Eagle Tail Ranch*, A-29335 (July 8, 1963). Such an event is, of course, uncommon, but it serves to illustrate the fact that the entire authority and responsibility for allocation of the federal range is vested in the Department, to be exercised in such a manner as to provide for the most beneficial use thereof. *Red Canyon Sheep Co. v. Ickes*, *supra*. What we say is simply that the economic impact on a licensee, while entitled to careful consideration, is, and always has been, but one of the factors to be weighed in determining whether a decision affecting range privileges should be affirmed, modified, or reversed.

For example, the degree of harm to one licensee or sector may be justified by the degree or benefit derived elsewhere in the public interest, or the urgency of remedying more pressing needs. The availability of acceptable alternatives to a particular transfer, reduction or change in grazing privileges may also be considered. Planning for an anticipated increase in the demands on public grazing lands may, in some instances, be of an overpowering persuasion. The specific interests of one or more grazers must inevitably be balanced against the interests of all grazers in a particular district or contiguous districts, as well as the public interest. The desirability of satisfying immediate grazing demands must be compared with the necessity for long-range planning for the benefit of future users and the public at large, including the maintenance of ecological and other environmental values.

A decision may be unreasonable, arbitrary, or capricious yet have no adverse economic effects on the licensees to whom it applies. The obverse is also true: administrative action having the most severe economic implications to a particular licensee is not necessarily the product of an abused discretion and may be permitted to stand. See *A. K. Anderson et al. and E. M. Andrews*, I.G.D. 578 (1952), involving a 45 percent cut in grazing privileges.

It has been, and still is, of course, a prime objective of this Department in allotting the range to cooperate with the range users in con-

forming the grazing privileges granted to their customary operations so far as practicable and consistent with proper range management and the interests of the qualified users as a whole in the area affected. *Mrs. Lurley Holcomb et al.*, I.G.D. 404 (1944).

In examining the record before us, we are constrained to agree with the determination below that appellants failed to establish that the decision of the district managers was arbitrary and capricious. Nor do we find it otherwise unreasonable. At the hearing substantial evidence was received concerning the objectives to be accomplished by the transfer in question. The testimony of one of the district managers indicated that while the base properties of the appellants are located in Oregon, grazing privileges in Idaho were issued to them shortly after passage of the Taylor Grazing Act because of the natural drift into Idaho from the Oregon ranges.

Although the joint decision of the district managers does not reduce the total number of their privileges, appellants Maher and Mader testified that the consolidation could depreciate the value of their base properties.⁵ In support of their claims, Mader and MacIver presented some evidence that the forage on the Oregon side of the border is heavier than that on the Idaho side, at least in some places, but at the

hearing contrary testimony was offered.

It does not appear, however, that their continuance in the livestock business is in jeopardy or that their operations will be seriously impaired. On the other hand, it appears from the record that the transfer in question will consolidate in one district or the other grazing privileges which were formerly divided between two states. By eliminating the so-called "split use" between the two districts various benefits will flow from the management program sought to be implemented, particularly, better control of an existing trespass problem.⁶ Other benefits include construction of additional fencing with a planned rotation of use, better distribution of the livestock, general improvement in the utilization of the forage and administrative economy and efficiency. The prior con-

⁶ The record is something less than crystal clear on the amount of the trespassing and the identity of the trespassers (Tr. 252). However, Duncan MacKenzie conceded that he recognized the existence of the problem of trespass by unauthorized cattle on the federal range in both the Spring Mountain and French John Sub Unit (Tr. 164). The fact that the grass in the dry year of 1968 was better on the Oregon side than on the Idaho side near the end of the grazing period has some probative effect to demonstrate that the trespassing was limited, but would not necessarily negate the existence of trespass. The record clearly supports the view that "split-use", i.e., "a licensee using two adjoining pastures * * * creates a situation that lends itself to trespass" (Tr. 234). See also Tr. 235, 257, 272, and 311.

Trespass, in this context, includes grazing more than the authorized number of livestock or permitting livestock to be on the federal range on dates not embodied in the authorization.

Trespass may occur despite the absence of willfulness.

⁵ Appellant Carol MacIver did not testify, but requested that her case be recognized on the basis of her written appeal and the testimony of Mader.

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solidation of grazing privileges, by decreasing the number of licensees using a particular range area, permits better and more economic implementation and control of this management program.

Although appellant Maher complains that the transfer of his grazing rights was in no way connected with any current management program and is thus arbitrary or capricious, he also maintains that it was arbitrary and capricious for the Bureau to shift his privileges simply for the purpose of obtaining an overall balance of grazing privileges in the two states involved. We find these two complaints mutually inconsistent. Evidence presented by the Bureau indicated that it was necessary to transfer Maher's privileges from Idaho to Oregon to prevent an over-obligation on the Idaho side. Thus this transfer, in our opinion, is not unreasonable in view of its being an integral part of the management plan contemplated.

Appellants' contentions in their appeal to the Board are essentially those embodied in their appeal to the Director, Bureau of Land Management. The Director's decision adequately dealt with those contentions, and to the extent the Director's decision is not inconsistent herewith, it is adopted by reference. We find sufficient evidence in the record for our conclusion that the action of the district managers, although it discommodes the appellants and may cause them some eco-

nomic loss, is in consonance with desirable range management objectives and is therefore to be permitted to stand. This is not to suggest that we will not carefully consider the appropriateness of an otherwise lawful action which results in severe economic impact. In our judgment, the facts in the case at bar do not demonstrate such a severe economic impact.

In summary, we find from our review of the record that the consolidation of grazing privileges challenged here by appellants is a reasonable and necessary prerequisite to the formulation and implementation of the various range management programs envisioned by the Bureau.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081) the decision appealed from is affirmed as modified.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

JOSEPH W. GOSS, *Member*.

UNITED STATES v. IDEAL CEMENT
CO., INC.

5 IBLA 235

Decided March 23, 1972

Petition for reconsideration of a
final decision of the Department

dated June 25, 1970, by the Director of the Bureau of Land Management, reversing a decision by hearing examiner Graydon E. Holt dated December 1, 1969 (AA 062315), and approving mining claims for patenting.

Petition granted and decisions vacated. Case remanded to hearing examiner for recommended decision.

Mining Claims: Contests—Mining Claims: Determination of Validity

If upon review of the record of contest proceedings it is evident that stipulations of fact by the parties to the proceeding are insufficient to support the finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, a hearing will be ordered to receive and develop additional evidence on the issues in the contest complaint.

Mining Claims: Contests—Mining Claims: Determination of Validity

The Secretary of the Interior may inquire into all matters vital to the validity of mining claims at any time before the passage of legal title, and, where it is evident upon review of the record of contest proceedings that stipulations of fact by the parties are insufficient to support a finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, may order a hearing to receive and develop additional evidence on the issues in the contest complaint.

Mining Claims: Contests

When parties to a mining contest request that the contest be determined solely on the basis of stipulated facts, the stipulated facts must be read as a whole and each fact interpreted with reference to the whole, and any final determination

must be based upon the preponderance of the evidence.

APPEARANCES: Elden M. Gish, Office of the General Counsel, U.S. Department of Agriculture, Forest Service; Robert P. Davison (Holland and Hart), Ideal Cement Company, Inc.; and Beatrice Challiss Laws, Sierra Club, as amicus curiae.

Opinion By Mr. Day

INTERIOR BOARD OF LAND APPEALS

The Forest Service, U.S. Department of Agriculture, has petitioned the Board of Land Appeals for reconsideration of a final decision of the Department issued on June 25, 1970, by the Director, Bureau of Land Management.¹ That decision reversed a hearing examiner's determination that certain placer mining claims located in the Tongass National Forest, Alaska, were null and void for lack of discovery of a valuable mineral deposit and ordered that a mineral patent (Anchorage 062315) be issued to the Ideal Cement Company (Ideal).² The Sierra

¹ The decision of the Director was made prior to the delegation of final review authority to the Board of Land Appeals by the Secretary of the Interior, effective July 1, 1970. (211 DM 13.5; 35 F.R. 12081.)

² The hearing examiner held the Tom Nos. 1 through 38, inclusive, Tamlin, Winnie, Cheryl N., Carolyn, Mark, Roxann, and Kay placer mining claims of the Ideal Cement Company, Inc., situated on Heeceta Island on the west side of Port Alcee, Ketchikan Recording District, First Judicial Division, Alaska, within the Craig Ranger District of the Tongass National Forest, Mineral Surveys 2209 and 2228, to be null and void for lack of discovery of a valuable mineral deposit and rejected the mineral patent application filed for the claims under the United States mining laws, as amended, 30 U.S.C. §§ 22, 29 and 35 (1964).

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Club, as *amicus curiae*, filed a brief in support of the Forest Service's position.

The contest proceeding was initiated upon the request of the Forest Service. The Bureau of Land Management land office at Anchorage issued the complaint on April 1, 1966, alleging that "[n]o discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials." Ideal Cement Company, the contestee, filed a timely answer denying these allegations. Following a prehearing conference, the parties agreed to submit a stipulation of facts and requested that the hearing examiner make his determination solely on the basis of the stipulated facts.³

There does not appear to be a dispute between the parties, nor between the Director and hearing examiner, as to the legal principles applicable to a determination of the validity of the discovery on the mining claims in this proceeding. Briefly stated, they are the "prudent man test," which requires that the deposits must be "* * * of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." *Castle v. Womble*, 19 L.D. 455, 457 (1894);

Chrisman v. Miller, 197 U.S. 313, 322 (1905), and the "marketability test," which requires that in order to qualify as a valuable mineral deposit under the mining laws, it must be shown that the mineral can be "extracted, removed and marketed at a profit." *Layman et al. v. Ellis*, 52 L.D. 714, 721 (1929); *United States v. Coleman*, 390 U.S. 599, 600 (1968). The latter test has been refined to require that a "mineral locator * * * must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." *Solicitor's Opinion*, 54 L.D. 294, 296 (1933); *Foster v. Seaton*, 271 F. 2d 836, 838 (1959).

Viewing the stipulations, the hearing examiner found that the cheaper limestone presently available to Ideal from the closer source of Texada Island, British Columbia, precluded any profitable operation of the subject claims situated in Alaska. Therefore, he concluded that the contestee had failed to satisfy the prudent man rule originally enunciated in *Castle v. Womble*, *supra*; or the marketability test approved in *United States v. Coleman*, *supra*.

Viewing the same stipulations, the Director found that the Forest Service stipulated in paragraphs 8 and 9 that the claims were valid and, therefore, failed to make out a *prima facie* case of invalidity. He concluded that the stipulated facts

³ See Appendix A for the text of the stipulated facts.

were part of the record, that the Forest Service had admitted their validity, and that the Department was bound by them. Accordingly, he reversed the hearing examiner, and ordered that the application for mineral patent be processed, consistent with his decision.

First, there is no question that prior to the issuance of a patent the lands in mining claims remain subject to the jurisdiction of the Secretary of the Interior, and he may at any time reexamine the correctness of a determination as to the validity of the mining claims, and, if he deems it necessary, remand the case for the taking of additional evidence, after proper notice and opportunity for an adequate hearing. *Cameron v. United States*, 252 U.S. 450, 459 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *United States v. Clare Williamson*, 75 I.D. 338, 342-343 (1968).

It is well settled that "when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid." *Foster v. Seaton*, *supra*. Upon first glance at stipulations numbered 8 and 9, it might seem that the parties agreed that the Forest Service had stipulated that a *prima facie* case did not exist. Number 8 reads in part: "The limestone on the subject claims *can be presently used* in the manufacture

and sale of cement *at a profit*"; and number 9, states, in part: "The Seattle, Washington, plant of Ideal *is a market* for limestone from the subject claims, together with other plants of Ideal along the Pacific coast." (Italics added.)

However, these quotes are but two phrases taken out of a set of stipulated facts containing 16 separate paragraphs. A stipulation is an agreement to which the general rules of interpretation of agreements apply. Such an agreement must be read as a whole and every part should be interpreted with reference to the whole. *United States v. Utah, Nevada, and California Stage Co.*, 199 U.S. 414, 423 (1905); 4 Williston on Contracts § 618 (Jaeger ed. 1961); 3 Corbin on Contracts § 549 (1960). Any determination of the validity of the mining claims must be based upon the preponderance of the evidence as deduced from the stipulations as a whole.

The main question presented, then, is whether it has been demonstrated by a preponderance of the evidence that full compliance has been made with the requirements of the mining laws, including a valid discovery of limestone deposits on the mining claims in issue in accordance with the prudent man and marketability tests. A finding that the evidence of the contestee merely meets the evidence of the contestant would not establish the validity of the claims. The validity of the claims must be shown by a preponderance of the evidence with respect

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to all material facts in issue. *Foster v. Seaton*, *supra*. Also, inherent in any determination is a consideration of whether the evidence of record as a whole affords a sufficient basis upon which to make findings with respect to the charges in the complaint and the consequent validity or invalidity of the claims.

The parties have clearly agreed that the limestone on the claims is not a common variety but of chemical grade quality, at least equal to most deposits of chemical grade limestone, that it is suitable for use in making cement, and that the subject claims are chiefly valuable for limestone. They have also agreed that the claims contain a vast quantity of limestone, estimated at approximately 200,000,000 tons, and the claimants have expended the required \$500 in labor or improvements.

With respect to present demand and marketability of the limestone, however, the stipulations are vague and too general and sketchy in nature to be decisive of the issues raised in the complaint. A careful reading of the stipulated facts as a whole reveals, *inter alia*, that there is a lack of evidence as to other limestone sources, if any, which supply the same general market area, the existence of a present demand for the limestone deposits from the contested claims, a comparison of production and overhead costs of marketing the limestone on the subject claims with evidence of the costs of producing and marketing other limestone of similar quality in the

same general market area, and other like factors.

Further scrutiny of the entire set of stipulated facts reveals that the market on which Ideal relies is limited to its own plants and that Ideal is meeting its present needs at its Seattle, Washington, and Redwood City, California, plants from sources much closer than the subject claims. Among other things, due to cheaper transportation costs, limestone from Texada, British Columbia, is presently being delivered to the Seattle plant at a cost of only \$1.48 per ton, as contrasted with an estimated cost of \$1.94 per ton from the subject claims. In addition, the calcium carbonate needed in the manufacture of cement at the Redwood City plant is being supplied by shells dredged from the San Francisco Bay. The stipulations do not include estimated per ton costs to Redwood City, but because of the greater distance we might assume that the transportation costs will be greater from the subject claims than from Texada or the San Francisco Bay area. If we were to base our judgment solely on the cost differential between delivery from Texada or the subject claims to Ideal's Seattle plant (the only costs of record), we would have to conclude that any effort to exploit the limestone on the subject claims would not be prudent.

The stipulations are fraught with conjecture, unsupported predictions, and voids. There is no indication that the present sources of calcium carbonate will be depleted in the near future. It is stated that

there is "a distinct possibility" that Congressional legislation will prohibit the use of dredged shells as a source of calcium carbonate for cement production, and that it is "possible that British Columbia may by legislation forbid exports of limestone." It is also stated that Ideal seeks the limestone on the subject claims as a "domestic reserve against these possibilities." From the information provided, it appears that Ideal may continue to use the closer, cheaper sources of calcium carbonate indefinitely. The stipulation that the "presently used sources of raw materials will be depleted" before the expectant lives of many of the cement plants in the Pacific northwest and northern California have expired is too vague to provide any indication that there is a market or present demand for limestone from the claims. The record does not reveal the expectant lives of any of these plants. However, we do know that Ideal's Seattle plant commenced operation only in 1967 and will undoubtedly be in use for many years to come. The stipulation that the Seattle plant "is a market" cannot stand alone. Other information provided by the stipulations contradicts it and the record is void of any mention of the existence of a present demand.

For the reasons stated above, we find that the stipulations do not provide adequate information on which to base a determination. As the duly delegated representatives of the Secretary of the Interior we are "charged with seeing * * * that

valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, *supra* at 460; *accord*, *Palmer v. Dredge Corp.*, 398 F. 2d 791, 792 (1968), *cert. denied*, 393 U.S. 1066 (1969);⁴ to carry out this duty, we must have an adequate record on which to base a decision. It has been recognized that when the record is not sufficient, an administrative agency "should see the record is supplemented before it acts." *Isbrandtsen Co., Inc. v. United States*, 96 F. Supp. 883, 892 (1951), *aff'd per curiam*, 342 U.S. 950 (1952).

It is concluded that the stipulated facts will not support a finding that the mining claimants have satisfied the requirements of the mining laws with respect to evidence of present demand and marketability at a profit of the limestone deposits on the contested claims. For this reason and also because the parties are in apparent disagreement as to the proper meaning of certain specific and material statements of fact to which they stipulated, the case must be remanded to the hearing examiner for a hearing to receive and develop positive and definitive additional evidence on the issues raised in the complaint. Upon the conclusion of the hearing, the examiner

⁴ The Department of the Interior encourages stipulations in mining contests as well as all other proceedings. If properly drafted, such stipulations alleviate the burdens of all parties, including the Government, and the administrative process may be expedited and costs mitigated. However, the Secretary's duties, as stated in *Cameron*, and the public interest are always paramount to such procedural tools and devices.

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shall prepare a recommended decision for submission to this Board, together with the complete case record from the initiation of the contest proceeding. A copy of the recommended decision shall be served on each party, and each will be allowed 30 days from service to file with the Board any brief which it may wish to submit. Thereupon, a final administrative determination shall be made by the Board in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Director of the Bureau of Land Management, dated June 25, 1970, and the decision of the hearing examiner, dated December 1, 1969, are vacated, and the case is remanded to the hearing examiner for further proceedings as indicated herein.

JAMES M. DAY,
Ex Officio Member.

WE CONCUR:

NEWTON FRISHBERG, *Chairman.*

ANNE POINDEXTER LEWIS, *Member.*

APPENDIX A

1. Ideal Cement Company ("Ideal") is a Colorado corporation with cement plants, terminal facilities and quarries in 14 states. It has been producing cement from limestone since 1904, and its pro-

ductive capacity in 1967 was 41,000,000 barrels.

2. The date of location of the limestone placer mining claims involved in this contest and the exploration activity by Ideal are as stated in the patent application.

3. The limestone in the deposit is suitable for making cement.

4. There are approximately 200,000,000 tons of limestone within the subject claims.

5. Ideal has performed the required \$500 expenditure per claim.

6. The good faith of Ideal in acquiring these claims is not in issue.

7. The subject claims are chiefly valuable for limestone. The timber has been removed pursuant to license issued by the Forest Service, and the Forest Service at the present time does not have a program of reseeding or replanting. New growth is dependent upon natural propagation. Neither is the land at the present time included in any recreation or other development plan and is not considered particularly satisfactory for recreation, residence, or industrial use because of terrain and surface baldness.

8. The limestone on the subject claims can be presently used in the manufacture and sale of cement at a profit. The agreed estimated per-ton cost of limestone from these claims delivered at Ideal's Seattle plant is \$1.94, including a 25-year amortization charge. Presently, Ideal is supplying its Seattle plant from its own and other limestone sources on Texada, British Columbia, at a per-ton delivered cost of \$1.48.

9. The Seattle, Washington, plant of Ideal is a market for limestone from the subject claims, together with other plants of Ideal along the Pacific coast. The Seattle plant site was used by Ideal as a terminal beginning in 1959; the present plant construction began in 1965 and the plant commenced operation March 15, 1967.

10. Ideal considers the subject claims as a source of limestone for the Seattle plant as well as for the Pacific Northwest, California and Alaska areas.

11. The subject claims are readily accessible by water to the limestone market in the Pacific Northwest, Northern California and Alaska. The quarry operation contemplated by Ideal at the subject claims includes facilities to load ships and barges. The claims adjoin a deep-water harbor.

12. A potential general market exists for limestone from southeastern Alaska. There have been no sales of limestone from the subject claims or from any other southeastern Alaska source since 1949 when Permanente Cement Company briefly operated a quarry on Dall Island. Claims are being located in the same general area as the subject claims and presumably patents have been or will be applied for by others, including U.S. Steel, Sinclair Oil Company, and Lone Star Cement Company. The limestone in this deposit is chemical grade quality, being at least equal to most deposits of chemical grade limestone.

13. Based on population projections made by Ideal from data obtained from the U.S. Bureau of the Census, it is estimated that cement consumption in the Pacific Northwest and Northern California will increase 300 percent in the next 50 years. Present productive capacity of Ideal in the area is 6 million barrels annually. Thus 50 years hence Ideal projects it will need 18,000,000 barrels annual capacity in the Pacific Northwest and Northern California. On a nationwide basis present production for the entire cement industry is, on an annual average, utilizing about 76 percent total capacity, but Ideal exceeds this industry figure.

14. The Redwood City, California, plant of Ideal uses shell dredged from San Francisco Bay as a source of calcium carbonate. There is a distinct possibility that Congressional legislation will prohibit use of such a source of calcium carbonate for cement production. It is also possible that British Columbia may by legislation forbid exports of limestone. Ideal believes that the subject claims are a legitimate and necessary domestic reserve against these possibilities.

15. Cement plant operators in the Pacific Northwest and Northern California are faced with dwindling supplies of suitable limestone to meet the growing demand for cement. Before the expectant life of many of these plants has expired the presently used sources of raw materials will be depleted. Southeast Alaska affords an excellent

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quality material, the deposit being superior to most deposits found in the lower states, and the material can be delivered economically and feasibly by water.

16. Ideal has a master plan for development of the subject claims. However, the Forest Service is concerned that there will be no incentive for Ideal to develop the subject claims as a source of limestone.

APPEAL OF FIRE DETECTION SERVICE, INC.

IBCA-901-4-71

Decided March 29, 1972

Appeal from Contract No. A00-C14200624; Project No. A10-MA-60, Fire Alarm Systems; and Bureau of Indian Affairs.

Sustained.

Contracts: Construction and Operation: Payments—Contracts: Construction and Operation: Warranties

Where neither the contractor's obligations nor the Government's rights under warranty and guarantee clauses were dependent on a withholding of money, a withholding for the purpose of compelling the contractor to comply with Government directives under warranty and guarantee clauses was improper. A withholding insofar as based on the contractor's failure to furnish all "as built" drawings required by the contract was held to be proper.

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Warranties

Where the evidence failed to establish

that various malfunctions in fire alarm systems installed by the contractor were the contractor's responsibility under warranty and guarantee clauses, a site visit and work performed by the contractor during such visit pursuant to directives of the contracting officer constituted compensable work.

APPEARANCES: For appellant, Mr. Clarence A. Monaco, President, Fire Detection Service, Inc., Spokane, Washington; for the Government, Mr. Wallace G. Dunker, Department Counsel, Aberdeen, South Dakota.

Opinion By Mr. Nissen

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a findings of fact and decision of the contracting officer, dated March 25, 1971, which continued in effect a withholding in the amount of \$754.93 and denied appellant's claim of \$2,233.33 for expenses incurred in visiting the site and correcting deficiencies pursuant to the Government's demand. Since neither party elected a hearing, the appeal will be decided on the record.

The contract, dated June 25, 1969,¹ included Standard Form 23-A (June 1964 Edition), with modifications and additions. It required appellant to install within 90 days after receipt of notice to proceed a complete automatic and manual fire alarm system in each of buildings 32, 34, 35, and 36, which are three

¹ Appeal File, Exh. 1. References are to the appeal file unless otherwise noted.

dormitories and the Fort Yates High School at Fort Yates, North Dakota. A notice to proceed was issued on July 9, 1969, and acknowledged on July 11, thereby establishing the contract completion date as the end of the day on October 9, 1969. Change Order No. 1, dated November 13, 1969, increased the contract price from \$20,842 to \$20,932, and extended the completion date to October 24, 1969 (Exh. 4).

In the first week of November, the Government made three inspections of the fire alarm systems.² On November 6, 1969, appellant was given a punch list of deficiencies and required to redo a portion of the work.³ The work was again inspected on November 7, 1969, resulting in a finding that, with one ex-

ception,⁴ the punch list items had been satisfactorily corrected and that workmanship was satisfactory. The Government has admitted that the work was accepted as complete on that date (Brief, p. 2).

During the following five months various difficulties with the alarm systems were experienced. These difficulties appear to have been confined to the high school, building 32, and a dormitory, building 34 (Exh. 12, pp. 8, 9). In November and December of 1969, several false fire alarms were reported which were attributed to the shorting of bare wires in junction boxes and defective wiring in metal conduits (Exh. 12, pp. 7-9). In two instances (November 14 and December 15, 1969), bare wires in junction boxes were observed, one of which (building 34) was allegedly corrected by application of electrician's tape, while a report of one alarm on December 2, 1969, states "Exact exposure of wire was not observed but insulation is assumed to have been damaged during installation." Appellant was telephonically advised of these problems and requested to send a representative to check out

² "Excerpts from Mr. B. G. McDaniel's Area Staff Officer's Reports and Memorandums to the File, concerning conditions of the Fire Alarm Systems at Fort Yates." (Exh. 12, pp. 3-4). Included in a general list of deficiencies presented to the contractor on November 4, 1969, were the following:

* * * * *

"6. Wiremold kick plates not used where wiremold passes through floors in traveled areas.

"7. All sensing devices should be securely attached to utility boxes.

"8. Heat detectors in attic of Dormitories to be relocated.

"9. All conduit should be secured in accordance with N.E.C."

³ " * * * The contractor proceeded to rip out sections of conduit and replace same with wiremold in accordance with contract specifications. The improperly located heat sensing devices, in the attics of the Dormitories were relocated and installed in accordance with good engineering practices." (Exh. 12, p. 4). The most frequent deficiency on the punch list was the tightening of detector heads. Installation of conduit straps was also required in several locations (Exh. 12, pp. 4-6).

⁴ The one exception was that the contractor was to furnish necessary materials to relocate a smoke detector circuit in the air intake duct of the high school auditorium (Exh. 12, p. 6; Technical Specifications Section 1.01.A.1.f.). This duct and a suspended ceiling was apparently being installed under a separate contract (appellant's letter of February 4, 1970, Exh. 8; General Condition GC-1.B.3.). Appellant supplied the necessary materials on December 29, 1969 (Exh. 14), and the circuit was installed by the Government sometime prior to March 24, 1970 (Exh. 12, p. 10).

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the alarm systems. The Government incurred costs for service calls totalling an estimated \$88.50 to remedy the difficulties (Exh. 13).

By memorandum, dated December 30, 1969, the superintendent at Fort Yates reported that the system in building 34 was inoperative, and that two detectors were hanging from bedroom ceilings (Exh. 14). The superintendent concluded that the system had not been tampered with as the dormitory had been vacant since December 19, 1969, and that these detectors had never been properly attached by appellant. By letter of January 12, 1970, transmitting the above memorandum of deficiencies, appellant was reminded that it had agreed in a telecon on December 18, 1969, to send an engineer to Fort Yates to correct the deficiencies and notified that 10 percent (\$754.93) of the contract price would be withheld until the systems were operating according to contract requirements (Exh. 14). Appellant responded on February 4, 1970 (Exh. 8), asserting that it was obvious that Government maintenance personnel were not familiar with the operation of the system, that it was evident that the detector system was shorting across and that it was impossible for the wires to short across unless someone was playing with them. Appellant also asserted that it was impossible for detectors to vibrate loose, and that during the inspection each detector had been physically pulled to assure that it was securely anchored and that each de-

tector was secure when they left the jobsite. It was also pointed out that the specifications did not call for a waterproof installation and that during the progress of the work Government personnel had been advised that trouble could be expected where the conduit ran through steam saturated areas.

In February, Government personnel reported that alarm circuits 4 and 5 in building 32 were out of order, and that alarm circuits 1 and 5 in the high school building were defective due to shorting.⁵ On March 24 and 25, the Government investigated the trouble conditions and made the following report:

The fire alarm circuits in the high school dormitories were rechecked and, except for Circuit No. 4 in Building No. 34, and three fixed temperature heat detectors in the high school, [building No. 32] all circuits were cleared of trouble and the systems returned to normal operation. The two 135° fixed temperature units located in dressing rooms under the stage, were operated as a result of very high heat from radiators in close proximity to the heat detectors. The fixed temperature unit of the smoke detector located in the cold air return in the attic of the auditorium, was also found operated. The fixed temperature detectors were removed from service and wiring arranged to provide a supervisory circuit from the remaining units in alarm circuits.

Circuit No. 4 in Building No. 34, was found to be open between heat detector units No. 4 and 5. Numerous attempts were made to trace the wiring of the circuits and layout of the system was not in accordance with the drawings. In view

⁵ Exh. 12, p. 9 (Building 32 is the high school, however, Exhibit 12 reads as cited in the text).

of the circuit discrepancies, this trouble will be reported to the installation contractor for correction. (Exh. 12, pp. 9, 10).

Thus, it appears that as of March 25, 1970, the only difficulties with appellant's fire alarm systems involved circuit 4 in building 34 and that the Government was unable to correct the malfunctions because appellant's wiring could not be traced.

In a letter, dated April 10, 1970 (Exh. 9), appellant referred to a telephone conversation with the Bureau's Mr. McGregor (probably should be Mr. McDaniel, note 2, *supra*), wherein it was admitted that a radiator was producing so much heat that it was activating the rate of rise detector and that the Government had improperly installed the smoke detector (note 4 *supra*). Appellant stated that if there was an open condition in Zone 4 of building 34, it could only have been brought about by tampering with the system. Appellant asserted that the situation described was not a warranty item and that it would be necessary to charge the Government for any trip to investigate the difficulties.

By letter dated April 10, 1970, the contracting officer replied to appellant's letter of February 4, 1970, and informed appellant that the Government had been unable to correct circuit No. 4 in building 34, because neither the "as-built" drawings nor the original drawings reflected the wiring as actually installed (Exh. 16). The contracting officer admitted

that most of the trouble was caused by operated fixed temperature heat detectors which would be replaced by the Bureau of Indian Affairs. The letter requested that appellant's Mr. Kelly visit the site to correct or supervise the restoration of the circuits and revise the "as-builts" to reflect the circuits as installed.

On April 23, 1970, the Government conducted another inspection of the high school and dormitory fire alarm systems. The report of this inspection states that grounded wiring in the alarm circuits was discovered and that it was believed that the trouble in the wiring and alarm circuits was due to poor workmanship (Exh. 12, p. 10). The report also states that the wiring at the master control units was disconnected and the circuits terminated with 600 ohm resistors.

By letter dated May 14, 1970, the contracting officer confirmed a telephone conversation with appellant's general manager in which appellant had agreed to visit the site so that the parties could determine whether the malfunctions were the responsibility of the contractor or the Government (Exh. 17). If the latter, the Government agreed to pay the cost of the visit and the repairs.

On October 2, 1970, in response to the contracting officer's telegraphic and written threats of termination dated September 14 and 24, 1970,⁶

⁶ Exhs. 18 and 20. The telegram referred to a letter of December 19, 1969, regarding deficiencies in the system in various buildings which is not in the record, while the letter referred only to the contracting officer's letter of April 10, 1970.

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two of appellant's representatives visited Fort Yates. The parties are in strong disagreement as to the causes of the malfunctions and the amount of corrective work accomplished by appellant during this visit. Appellant's position, detailed below, is that the difficulties in building 34 were due to vandalism and poor maintenance, and that therefore a change order reimbursing appellant for travel and repair expenses should be issued. Appellant gives the following account of its site visit:

Two zones were inoperative—Zones 4 and 5. All detectors were checked and two discrepancies were found. One manual break station had been activated and the break rod which had been installed after activation was not long enough to hold the break station in a closed position. The smoke detector in the stair well had been activated by the application of a match which discolored the star guard element and melted the fuse link. To reset the smoke detector requires another star guard element which we did not have with us. We checked with your maintenance man and discovered that the spare star guard elements which we had left had been used up. I am sending an element to be used to set up the smoke detector and several break rods for the break stations. Continuity checks of Zone 4 showed that there were no additional problems in that Zone.

We proceeded to Zone 5 and discovered two discrepancies in that area. The manual break stations had been operated, chewing gum had been deposited on the button and the handle taped with scotch tape. No break rods had been reinstalled. Mr. James Harrison, your maintenance man, supplied us with his last break rod, the chewing gum was cleaned off, the scotch tape was removed and the manual break station set up. Each detector in

turn was checked for continuity and it was discovered the Fenwall detector in the attic had been disconnected, apparently during a checkout of the system, and one wire had not been reinstalled. We connected this wire and the entire system in Zone 5 functioned properly.

During the course of the inspection it was discovered the detectors had been pulled from their mounts or brackets, and from conversation with Mr. Harrison, manual break stations had been activated so many times that he had run out of break rods. It was also discovered that the battery in the control cabinet in Building 34 had never been checked and was allowed to corrode. We replaced this battery and left a spare battery with Mr. Harrison.

* * * [W]ires still do not wiggle loose of their own accord and detectors do not drop from the ceiling without force being applied. In one case so much force had been applied that the screw holes had been stripped. We had to redrill to re-install the detector. (Letter of October 5, 1970, Exh. 11).

Appellant asserted a claim in the amount of \$2,233.33 for inclusion in a change order and concluded with a statement that it had submitted its last copy of "As Build [sic] drawings of Building No. 34" to the Government's maintenance man, Mr. Harrison.

During the visit on October 2, 1970, appellant's representatives were accompanied by project Inspector Willis F. Jones. His report dated October 2, 1970 (Exh. 22), confirms many of the statements in appellant's letter of October 5, 1970, quoted above, for example, that a fuse plug was burned out at stair ceiling No. 6 and that there were no replacements on hand, that the manual stations in second floor hall

(Zones 4 and 5) had break bar pins missing, that the handle at one station was held in place by scotch tape and the replacement bar furnished by the Government was the last one in stock. The report does state that a short in a junction box near the south attic detector unit was fixed. The report refers to a statement by appellant's representatives that a wire was not connected on a detector in the attic but states that he (Jones) did not see the loose wire. Appellant confined itself to building 34 and there is no evidence that the Government inspector made any objection. The report also confirms that several detectors were hanging loose and that the entire system was placed in operation at 2:30 p.m.

Addressing himself particularly to the statements in appellant's letter of October 5, 1970, Mr. Jones stated that he could not verify all of the so-called findings in the letter. He did not know whether all detectors were checked (undated report, Exh. 22). With respect to appellant's assertion that a smoke detector in a stairwell had been activated by application of a match, he stated that was an assumption. He admitted that the fuse plug was melted, but asserted that he examined the metal ring when it was pried loose from the fixture and could find no discoloration then and still could find none. He denied knowledge of frequent activation of manual break stations as allegedly reported to appellant by the Government's electrician, Mr. James Harrison, and stated that corrosion

on the battery in the control cabinet of building 34 was not brought to his attention. However, he stated that his review indicated that the system had not been activated for some months and that this could contribute to corrosion. He admitted that there was some truth in appellant's assertions that wires do not come loose of their own accord and detectors do not drop from the ceiling without force being applied. Nevertheless, he asserted that normal building vibration or expansion and contraction of metal conductors could cause a short circuit if bare wires or connections were present. He further stated that some of the conduits ran along attic walkways and could easily be stepped upon and that some of the boxes are unsupported and hang from the ceiling below.⁷ He did not deny appellant's allegation that sufficient force had been applied to one detector to strip the screw holes, but asserted that there was only one screw initially and that a makeshift punch was used since appellant's representatives did not have a drill.

⁷ The systems were required to comply with the applicable provisions of the National Board of Fire Underwriters' Standard Number 72 and to meet all requirements of the local authorities having jurisdiction (Section 1.01 of Technical Specifications). Detectors were to be installed in accordance with Article 330 of the National Board of Fire Underwriters' Standard No. 72 and the spacing assigned by the Underwriter's Laboratories and located as shown on the drawings (Section 1.01 F.3 of Technical Specifications). Since National Board of Fire Underwriters' Standard Number 72 is not included in the record, we cannot determine whether "unsupported boxes hanging from the ceiling" comply with contract requirements.

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The evidence above establishes that the system in building 34 was placed in operation as a result of appellant's site visit on October 2. The Government, nevertheless, contends that the entire installation continues to be afflicted with numerous malfunctions traceable to appellant's poor workmanship. On October 20, 1970, the Government conducted a "one-year warranty inspection." The findings of this inspection, forwarded to appellant under date of October 23, 1970, are as follows:

Building No. 34:

1. Master control panel. When on standby power Zone 3 indicates trouble condition (white light).

2. Rate of rise heat detectors, Zone 5, units 1 and 16 hanging down from ceiling. Associated junction boxes in ceiling and conduits over walkway area (in attic) should be properly supported by conduit clamps and toggle bolts.

Building No. 35:

1. Zone 2, trouble in circuit (white light).

2. Zone 1, Station 17, junction box and detector head hanging down from ceiling should be properly supported by conduit clamps and toggle bolts.

Building No. 36:

1. Zone 5 indicates alarm condition (red light) for no apparent reason. This circuit has been removed from operation and the supervisory circuit terminated so that the remaining system is operable.

2. Zone 2, Station 5, detector cracked.

3. Zone 5, Station 6 and 12, light out in smoke detector, specifications require 15,000 hours of life.

High School: [Building 32]

1. Zone 4, alarm circuit grounded.

2. Zone 1, A3 flashing alarm does not work (Exh. 23).

Appellant was advised, that the above items were warranty deficiencies and therefore appellant's responsibility.

Appellant responded to this letter on November 30, 1970, asserting that all malfunctions found on its visit to the site were attributable to vandalism, a fact which would be verified by Mr. Willis Jones (Exh. 7). Appellant demanded release of moneys withheld and payment of \$2,233.33, the asserted cost of the site visit by its personnel.

In a letter dated December 7, 1970, the contracting officer referred to numerous trouble calls involving shorts and grounds in junction boxes and conduit (Exh. 24). In apparent reliance on the comments of Inspector Willis F. Jones, referred to above, the letter stated that bare spots on wires within conduit could move from temperature changes and building vibrations and thus cause the shorts and grounds. The letter stated that Mr. Jones had found no evidence of vandalism as reported by appellant, that they were in the process of determining the causes of the numerous malfunctions and that until the items listed in the October 23 letter had been corrected, the malfunctions would be considered appellant's responsibility. Appellant reiterated the assertions in its letters of October 5 and November 30 that items corrected on the October 2 site visit were attributable to vandalism in a letter of December 29, 1970 (Exh. 6). The letter alleged that the installation not only met the re-

quirements of the contract, but also the stringent requirements of the NFPA (National Fire Underwriters Protective Association). With respect to a detector which had been pulled from its mount in the attic, it was stated one of the wires had been cut with a sharp instrument. This is apparently the wire referred to as disconnected in the October 5 letter.

The contracting officer secured technical assistance of an electrical engineer, Mr. Henry Domby, from the Bureau's Denver Office. Mr. Domby visited the site during the week of January 4-9, 1971. His report, dated January 26, 1971 (Exh. 26), states that appellant submitted improper and incomplete drawings, that the drawings did not agree with the equipment as installed and that the drawings were lacking in quality, completeness, and clarity. He concluded that layouts of the wiring differed from the contract drawings, that appellant had not installed the detectors in the sequence called for by the contract, and that the "as built" drawings did not show the sequence actually used. He stated that in order to locate trouble spots it would be necessary to trace out and record every zone in every building on the "as built" drawings. However, he checked only Zone 4 in building 34 for layout in accordance with contract drawings. He concluded that workmanship in installation of wiring was of poor quality, that junction boxes and conduits were inadequately sup-

ported,⁸ and that sheet metal screws had been used in many instances to fasten detectors and covers in lieu of properly threaded screws.

With respect to specific deficiencies listed in the warranty inspection, Mr. Domby confirmed that the master control panel in building 34 indicated a trouble condition (white light) when on standby power. Since appellant states that the battery for this panel was replaced at the time of its October 2 site visit, it does not appear that this difficulty is attributable to the battery. The warranty inspection indicated a trouble condition (white light) in Zone 2, building 35. Mr. Domby did not specifically refer to Zone 2 of building 35, but reported that when the reset button was pushed to clear trouble lights, the trouble light in the cleared circuit went out and the trouble light for another circuit immediately came on. He traced the ground in Zone 4 of building 32 to a white wire connecting detectors in the ceiling of the gymnasium. The report states that this circuit had been bypassed in the fall of 1970. We find no support in the record for this assertion. He also reported that an end-of-line resistor of improper value had been installed by the contractor in Zone 4 of building 32. He was evidently

⁸ For this conclusion, he relied on the National Electrical Code. We find no reference to this Code in the contract. However, it is possible that it is referenced in the National Board of Fire Underwriters Standard Number 72 (notes 2 and 7, *supra*).

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unaware that this resistor as well as similar resistors in other circuits were installed by Government personnel on April 23, 1970.

The contracting officer denied appellant's claims on the basis that appellant failed to submit proper "as-built" drawings,⁹ corrected its poor workmanship only in building 34 and failed to address itself to numerous shorts and grounds plaguing the entire installation (Findings of Fact, pp 15-17). In making his determinations, he relied heavily on Mr. Domby's report. He referred to inspector Jones' report as contradicting appellant's allegations of vandalism and specifically found that the malfunctions were not attributable to vandalism, but to the manner in which the systems were installed.

On appeal, appellant asserts that by measurement there are three inches between terminals of the rate-of-rise fixed temperature heat detectors and that it was physically impossible for the wires to touch and ground out (notice of appeal of April 16, 1971). Appellant further asserts that there is a similar safety factor in each of the other detectors and that a building which expanded and contracted or vibrated enough to bridge this gap could not stand.

Appellant alleges that a dozen or more spare break rods for manual stations were left with maintenance personnel at the completion of the work and the fact that only one rod was on hand at the time of its site visit and that no fires were reported indicates that the agency was plagued with false fire alarms. Appellant alleges that the restoration of two break stations, one smoke detector and the re-connection of a severed wire in building 34 restored the system. It is further alleged that the "as built" drawings reflect the systems as installed and that the Government inspector apparently had no difficulty in following the drawings.¹⁰

Responding to the Board's Order to furnish documents pertinent to the appeal (note 10, *supra*), the contracting officer (letter of February 1, 1972), asserts for the first time that "as built" drawing, sheet No. 11 (building 35), was not received from the contractor. Appellant has not responded to this allegation. The contracting officer further asserts that based on the findings in building 34, the drawings submitted by the contractor for the remainder of the work cannot be depended upon to reflect "as built" conditions, that the systems as installed were not in accordance

⁹ In supplementing the record, the Government submitted estimated costs of \$2,082 for tracing the circuits, preparing proper "as built" drawings and rehabilitating the wiring of which \$1,086 was for "as built" drawings (memorandum, dated September 13, 1971, Govt's Exh. D). It appears that there are approximately 29 circuits including horn circuits resulting in an estimated cost of approximately \$37.45 per circuit for "as built" drawings.

¹⁰ General Condition (GC-1.C.2.) requires the "as built" prints to be submitted to the project inspector for approval and counter-signature prior to final inspection of the work. These drawings, submitted pursuant to the Board's Order of December 27, 1971, bear on the reverse of Sheet 7 the signature of Mr. B. G. McDaniel, Area Communications Officer, and the date of November 7, 1969.

with contract drawings,¹¹ and that in order to have reliable drawings for maintenance and trouble shooting it would be necessary to trace out the remainder of the circuits as was done for Zone 4 in building 34.

Contract Provisions

In addition to contract requirements referred to previously (notes 7 and 11, *supra*), the following contract clauses are pertinent to this dispute:

Standard Form 23-A.

7. Payments to Contractor.

* * * * *

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work.

* * * * *

(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically accepted by the Contractor from the operation of the release. * * *

10. Inspection and Acceptance.

* * * * *

¹¹ We find no merit in this contention since it is clear that fire alarm and electrical system layouts as shown on the drawings were approximate, that exact routing of conduit, location of junction boxes and fire alarm stations was to be governed by structural conditions encountered in the work and that the purpose of the "as-built" drawings was to reflect the systems as installed (General Conditions, GC-1.B.2. and GC-1.C.1-3.).

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

General Conditions.

GC-6. LIQUIDATED DAMAGES: Liquidated damages will be assessed in the amount of \$20.00 per day for each calendar day of delay beyond the time for completion stated in the Contract, or any extensions thereof that may be granted pursuant to the terms of the Contract until the work is determined by the Contracting Officer to be substantially complete.

The following warranty provisions are included in the contract:

Addition to SF 23-A General Provisions.

Warranty of Construction: (a) Except as otherwise expressly provided in this contract, the Contractor shall remedy at his own expense any failure of the work (including equipment) to conform to contract specifications and any defect of material, workmanship, or design in the work—but excluding any defect of any design furnished by the Government under the contract, provided that the Government gives the Contractor notice of any such failure or defect promptly after discovery but not later than one year after final acceptance of the work, except that in the case of defects or failures in a part of the work of which the Government takes possession prior to final acceptance, such notice shall be given not later than one year from the date that the Government takes such possession. The Contractor, at his own expense, shall also remedy damage to equipment, the site, or the buildings or the

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contents thereof which is the result of any failure or defect and restore any work damaged in fulfilling the terms of this clause. Should the Contractor fail to remedy any such failure or defect within a reasonable time after receipt of notice thereof, the Government shall have the right to replace, repair or otherwise remedy such failure or defect at the Contractor's expense. *This warranty shall not delay final acceptance of or final payment for the contract work. (Italics supplied.)*

The Technical Specifications provide an additional guarantee:

J. Testing Guarantee.

2. The fire alarm system shall be free from defects in workmanship and material, under normal use and service, for a period of 12 months from the date of acceptance. Any equipment proved to be defective in workmanship or material shall be repaired, replaced and/or adjusted free of charge.

Decision

The first issue is the contracting officer's right to continue in effect the withholding of \$754.93.

Clause 7, Payments to Contractor, of the General Provisions, portions of which are quoted above, provides for progress payments based on estimates as the work progresses and for retaining 10 percent of the estimated amount until final completion of the work. Whenever 50 percent of the work is completed, the contracting officer may authorize the remaining progress payments to be made in full if satisfactory progress is being made and whenever the work is substantially complete, the contracting officer, if he considers the retained amount in excess of the amount adequate for

the protection of the Government, may release all or any portion of the excess amount. Here it is undisputed that the work was accepted as complete on November 7, 1969, and that thereafter the Government has asserted rights under the Warranty of Construction and Guarantee clauses. The Warranty of Construction clause is effective from and after final acceptance or from the date the Government takes possession if that occurs prior to final acceptance and the Guarantee clause is effective from date of acceptance.¹²

We find nothing in the contract which indicates that the Government's rights or the contractor's obligations under the warranty and guarantee clauses are in any way dependent upon a withholding of money. Indeed, the final sentence of paragraph (a) of the Warranty of Construction clause specifically provides to the contrary. Accordingly, and in view of our holding on appellant's claim for additional compensation, we find that the withholding, insofar as based on appellant's alleged failure to fulfill its obligations under the warranty and guarantee clauses, is improper.¹³ The withholding insofar as based on failure to complete the work and furnish "as built" sheet 11 for build-

¹² If the Government invokes warranty or guarantee clauses, obviously final acceptance must have taken place. *Drake America Corp.*, ASBCA No. 4914 (November 30, 1959), 60-2 BCA par. 2810.

¹³ Appellant has repeatedly demanded release of the withheld sum and we assume that a final invoice therefor has been submitted. There is no evidence that a release was required of the contractor.

ing 35 stands on a different footing. There appear to be seven circuits in building 35 and based on the estimated cost of tracing out the circuits and preparing proper "as built" drawings for approximately 29 circuits (note 9, *supra*), we determine that a withholding of 7 x \$37.45 or \$262.15 is appropriate. Accordingly, appellant is entitled to the release of \$754.93 less \$542.15 (the above \$262.15 plus \$280 liquidated damages based on 14 days' delay in substantially completing the work at \$20 a day) or \$212.78.

The second issue is appellant's claim to be compensated for its site visit and the work performed during such visit. While appellant is asserting an affirmative claim against the Government, the Government is relying on rights under the contract which assertedly survived acceptance as a defense to the claim. Under such circumstances, the burden of proof is on the Government.¹⁴

While it is evident that the Government is relying principally on the warranty clause as a defense to appellant's claim, it is well settled that the Government's rights under inspection and warranty or guarantee clauses are cumulative and not alternative.¹⁵ Accordingly, we will consider whether the evidence would support a finding of latent defects under the inspection clause

(there being no evidence or indication of fraud or gross mistakes amounting to fraud) and the Government's rights under the warranty and guarantee clauses.

A latent defect is a defect existing at the time of acceptance which is not discoverable by a reasonable inspection.¹⁶ Since we cannot properly regard allegedly improperly supported conduit, junction boxes and detectors, and malfunctions of undetermined causes as latent defects, the only indication of defects which could possibly be considered latent is the references to shorts and defective wiring in junction boxes and metal conduits. Most of these alleged shorts were reported prior to March 24-25, 1970, when Government personnel restored all circuits, except Zone 4 in building 34, to operating condition and appear to have involved circuits other than Zone 4 in building 34. It is significant that some of these difficulties were attributable to fixed temperature heat detectors installed in close proximity to radiators and that these detectors were replaced by the Government. Appellant restored all circuits in building 34, including Zone 4 to operation, at the time of its October 2, 1970, site visit.¹⁷ Al-

¹⁴ *Keco Industries, Inc.*, ASBCA No. 13271 (February 16, 1971), 71-1 BCA par. 8727.

¹⁵ The Government faults appellant for confining corrective work to building 34 and alleges that a telephonic agreement of May 13, 1970, whereby appellant would send representatives to the site and make necessary repairs, which agreement was confirmed by the letter of May 14, applied to all buildings. However, we are impressed by the fact that the May 14 letter refers to the "fire alarm system installed by your workmen" (the contract

¹⁴ *R. H. Fulton Contractor*, IBCA-769-3-69 (February 2, 1971), 71-1 BCA par. 8674.

¹⁵ *Federal Pacific Electric Company*, IBCA-334 (October 23, 1964), 71 I.D. 334, 1964 BCA par. 4494.

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though the contracting officer's letter of December 7, 1970, states that shorts and grounds in junction boxes and conduits were causing the malfunctions, the same letter states that they were in the process of determining the cause of the malfunctions. The statement that the malfunctions were caused by shorts and grounds in junction boxes and conduits is not supported by the warranty inspection or by Mr. Domby's report. The Government has not established that these alleged shorts existed at the time of acceptance. We conclude that the evidence would not support a finding that any of the alleged deficiencies were attributable to latent defects.

Turning to the Government's rights under the warranty clause, it is clear that the appellant is obligated to correct only those specification failures or defects in workmanship, material and design of which it is given notice within the 12-month period, in this case on or before November 6, 1970. The Government's rights under the guarantee, which covers defects in workmanship and material under normal use and service for a 12-month period, are not dependent on notice within the 12-month period.¹⁸

called for a complete system in each building) and by the fact that the contracting officer's letter of September 24, 1970, referred to his letter of April 10 which stated in part: "Zone 4 in building 34 is defective."

¹⁸ Notice, of course, must be given within a reasonable time after discovery of the defect. *J. R. Simplot Company*, ASBCA No. 3952 (January 30, 1959), 59-1 BCA par. 2112, modified on grounds not here pertinent (August 11, 1959), 59-2 BCA par. 2306.

The notices clearly given the contractor within the 12-month period or within a reasonable time after discovery of defects involve the "as built" drawings, building 34, in particular Zone 4, and the results of the warranty inspection which were furnished to appellant under date of October 23, 1970. There is no evidence that Mr. Domby's conclusions were forwarded to appellant prior to the contracting officer's Findings of Fact and Decision which were furnished by letter, dated March 26, 1971. Although the notices given appellant appear to have referred only to the warranty, we assume the notices were sufficiently broad to invoke the Government's rights under the guarantee as well.

It is undisputed that appellant restored the circuits in building 34 to operation at the time of its site visit. Far from disputing appellant's contentions that conditions encountered during this visit were attributable to vandalism or careless maintenance, we find that the report of the Government's project inspector largely corroborates these contentions. The report concedes that wires do not come loose of their own accord, that detectors do not drop from the ceiling without force being applied and that sufficient force had been applied to one detector to strip the screw hole or holes securing the detector to its mounting. The report confirms that a replacement break bar pin for manual stations was the last one in stock

and we accept appellant's assertion that several of these pins had been left with the Government at the completion of the work.

With respect to the heat detectors reported to be hanging from the ceiling and the improperly supported junction boxes and conduit (buildings 34 and 35) reported in the warranty inspection, we are impressed by the fact that deficiencies such as "kickplates" where wire mold passes through floors in traveled areas and securely fastening sensing devices and conduits were among punch list items presented to the contractor for correction prior to the acceptance inspection (notes 2 and 3, *supra*). While we find no requirement in the punch lists for securing junction boxes, it appears that detectors are fastened to junction boxes and it would be anomalous indeed to require detectors to be securely fastened while the boxes to which the detectors were attached are not so fastened. The Government inspector who accepted the work has not denied appellant's assertion that each detector was physically pulled at the time of the acceptance inspection to assure it was securely attached. The record, as we have seen (note 7, *supra*), does not enable us to determine contract requirements for installation and support of detectors.

The remaining items for consideration are trouble conditions and malfunctions the cause or causes of which were not determined by either the warranty inspection or

Mr. Domby. None of these conditions are inconsistent with vandalism or improper maintenance. We note that the Government installed a smoke detector in the cold air duct in the ceiling of the high school auditorium, that the Government replaced at least three fixed temperature heat detectors and that Government personnel installed end-of-line resistors of improper value. It is well settled that alteration of a contractor's product vitiates the contractor's obligation under warranty or guarantee clauses.¹⁹ We find that the Government has failed to demonstrate that the malfunctions in the fire alarm systems were attributable to defects in workmanship, material or design and are thus appellant's responsibility under the warranty or guarantee clauses. It follows that appellant is entitled to be compensated for its site visit and the work performed during such visit.²⁰

The Government's contention that appellant failed to supply proper "as built" drawings appears to be based solely on findings (memorandum of March 24-25, 1970, and Mr. Domby's report) with respect to Zone 4 of building 34. We

¹⁹ *South Portland Engineering Company, IBCA-770-3-69* (December 29, 1969), 69-2 BCA par. 8035.

²⁰ It is well settled that a contractor, performing work pursuant to directives of the contracting officer who purports to be acting under warranty or guarantee clauses, is entitled to be compensated as for a "change" where contractor responsibility for the work is not established. *The Florsheim Co., ASBCA No. 8023* (September 21, 1964), 1964 BCA par. 4225; *Aero Sheet Metal, Inc., VACAB No. 505* (May 28, 1965), 65-2 BCA par. 4882A.

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find that the drawings submitted by Mr. Dombey (supplement B of Exh. 26), clearly establishes that the drawing submitted by appellant does not follow the sequence of the detector installation in Zone 4, building 34. However, we cannot infer from this finding that the remainder of the "as built" drawings have similar deficiencies. We find that the Government is entitled to be compensated for the estimated cost (\$37.45, note 9, *supra*) of supplying the "as built" drawing for Zone 4, building 34.

Turning to the amount of the equitable adjustment, appellant's claim of \$2,233.33 is based on the services of two men for two full days. However, the record reflects that the total time involved, including travel time, was approximately 24 hours and that less than one working day was expended at the site (letter of October 5, 1970, Exh. 11). Appellant's cost figures have not been challenged and we compute the equitable adjustment as follows:

Two men at \$300 for one day---	\$600.00
Per diem at \$20 per day-----	40.00
Travel -----	468.00
Total -----	1,108.00
Overhead at 15 percent-----	166.20
Total -----	1,274.20
Profit at 10 percent-----	127.42
Total -----	1,401.62
Bond at 1 percent-----	14.02
Total -----	1,415.64

The total amount due appellant is as follows:

	\$1,415.64
	212.78 (balance of withholding)
	<hr/> 1,628.42
Less:	37.45 (cost of "as built drawing" Zone 4, building 34)
	<hr/> \$1,590.97

Conclusion

The appeal is sustained in the amount of \$1,590.97.

SPENCER T. NISSEN, *Member*.

I CONCUR:

ROBERT L. FONNER, *Member*.

RELIABLE COAL CORPORATION 1 IBMA 97

Decided March 31, 1972

Appeal from a decision by Ernest Hom, Chief Hearing Examiner, Office of Hearings and Appeals, dated September 15, 1971, denying two Petitions for Modification filed under section 301(c) of the Act (IBMA 72-3, IBMA 72-4), and dismissing an Application for Review filed pursuant to section 105(a) of the Act (IBMA 72-5). The matters were consolidated for hearing and have been consolidated for purposes of appeal.

Decision of the Examiner. **AFFIRMED.**

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards

An operator's petition for the modification of the application of a mandatory safety standard will be denied where such petition is based solely upon the argument that the operator's mine is not gassy.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Reasonableness of Time

The filing of a petition for modification by an operator should be a major consideration in determining the reasonableness of the time fixed for abatement of any alleged violation which relates to the safety standard sought to be modified.

APPEARANCES: Brooks E. Smith, Esquire, for appellant; J. Philip Smith, Esquire and Bernard M. Bordenick, Esquire, for U.S. Bureau of Mines; Charles L. Widman, Esquire, United Mine Workers of America.

Opinion By Mr. Doane

INTERIOR BOARD OF MINE OPERATIONS APPEALS

FACTUAL BACKGROUND OF IBMA 72-3 AND IBMA 72-4

On January 5, 1971, the appellant, Reliable Coal Corporation (Reliable), filed a Petition for Modification (docketed below as M 71-7) in accordance with section 301 (c) of the Act, seeking a waiver for Reliable's Kanes Creek Mine of the requirement of section 303(1) of the Act, and the implementing regulations thereto 30 CFR 75.313, *et seq.* This Petition requested that in lieu of a methane monitor on each of its three continuous miner machines in the Kanes Creek Mine Reliable

should be permitted to use a "methane detector or hand-carried methanometer" * * * to be used by section bosses for continuous routine periodic checks, * * *."

On January 25, 1971, Reliable filed its Petition (docketed below as M 71-9) "to modify the application of section 303(d)(1) of the Act, and regulation 75.304 *et al.*" so that Reliable could "continue to test for methane by use of a permissible flame safety lamp rather than by methane detectors * * *."

Notice of each of the Petitions appeared in the *Federal Register* in accordance with the statutory requirement. The Bureau and the UMW filed answers opposing the Petitions and the cases were consolidated for hearing.

At the hearing Reliable moved to have Petition M 71-9 amended to request use of the flame safety lamp for all of the methane tests required by section 303 of the Act in addition to the pre-shift tests for methane required by section 303(d)(1). The Examiner denied Reliable's motion on the ground that the other provisions of section 303 were not mentioned either in Reliable's Petition M 71-9 or in the notice of that Petition published in the *Federal Register*.

The Examiner's pre-trial order raised the question as to whether Reliable's Petition M 71-7 was premature, since methane monitors need not be installed on the continu-

¹ A methanometer is a type of methane detector and for purposes of this case any technical differences are deemed irrelevant.

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ous miner machines in the Kanes Creek Mine until March 30, 1974. The Examiner did not dismiss M 71-7 on this basis because he felt that the hearing required in Reliable's other Petition for Modification would involve essentially the same evidence. The Examiner's decision concluded that Reliable's Petition M 71-7 was premature, but he denied the Petition on the merits.

The Examiner concluded that as to both Petitions Reliable did not meet the required proof of section 301(c) that the use of a permissible flame safety lamp in lieu of a methane detector, or the use of either of these devices in lieu of a methane monitor, would guarantee the same measure of protection to the miners. The Examiner rejected Reliable's argument that he must consider whether the Kanes Creek Mine is not gassy and not potentially gassy. Although the Examiner permitted evidence on this question at the hearing, he decided that the Act abolished the gassy, nongassy distinction by treating all mines as potentially gassy and the Act therefore precluded his making any finding as to the potential for methane accumulations in Reliable's Kanes Creek Mine.

The Examiner also concluded that Reliable failed to meet the required alternative proof in section 301(c), that the use of methane monitors or methane detectors in the Kanes Creek Mine would result in a diminution of safety to the miners in that mine.

FACTUAL BACKGROUND OF IBMA 72-5

On January 7, 1971, an inspector issued a Notice of Violation of section 303(d)(1) of the Act to the operator of Reliable's Kanes Creek Mine which cited that: "Tests for methane were being made with a permissible flame safety lamp rather than a methane detector in the main east section." Reliable was given until January 22, 1971, to totally abate the violation.

On January 25, 1971, Reliable filed an Application for Review of the Notice of Violation (HOPE 71-109) contending that the period of time fixed to abate the violation was unreasonable and should be extended until a reasonable time after a final decision on Reliable's Petition for Modification M 71-9.

The time for abatement was extended several times by the Bureau and on June 14, 1971, the Bureau issued a Notice of Abatement. On July 29, 1971, after the record of the hearing was closed, the Bureau filed a motion with the Examiner to reopen the record to admit the Notice of Abatement into evidence. Reliable objected to the admission of this Notice unless the Bureau stipulated to certain facts relating to its issuance. The Bureau declined to so stipulate. The Examiner received the Notice of Abatement into evidence on the ground that Reliable failed to state any grounds for its objection to the Bureau's motion, and on the alternative basis that 5 U.S.C. sec. 556(e) permits

official notice of a document where a party has been given an opportunity to challenge the existence, authenticity, or substance of the document and fails to do so.

The Examiner dismissed Reliable's Application for Review on the basis that *Reliable Coal Corp.*, 1 IBMA 50, 78 I.D. 199 (1971) requires dismissal where the violation charged has been totally abated.

ISSUES PRESENTED FOR REVIEW

1. Whether Reliable's Petition for Modification of the application of section 303(1) of the Act to its Kanes Creek Mine is premature.

2. Whether section 301(c) of the Act permits an operator to obtain a modification of the application of a mandatory safety standard on the sole basis that the operator's mine is not gassy and not potentially gassy.

3. Whether the Notice of Abatement relating to the Notice of Violation which was the subject of Reliable's Application for Review should have been received into evidence after conclusion of the hearing on Reliable's Application for Review.

4. Whether it was proper for the Examiner to dismiss Reliable's Application for Review of a Notice of Violation on the sole ground that a Notice of Abatement of the alleged violation had been issued.

5. Whether the filing of a petition for modification of a safety standard should be considered in determining the reasonableness of

the time fixed for abatement in a proceeding under section 105(a) for the review of a notice of violation.

RULINGS OF THE BOARD

We hold that Reliable's Petition for Modification in IBMA 72-3 is not premature because we think that Reliable is entitled to a decision at this time as to whether it will be required to install methane monitors on its continuous miners by March 30, 1974. Reliable is entitled to a final ruling on its Petition prior to that date so that it will not be put in a position of being out of compliance with the Act or of having to purchase expensive equipment to comply with the Act which later is determined to be unnecessary if Reliable is successful on its Petition for Modification.²

We affirm the Examiner's ruling that Reliable did not carry its burden of proof on either alternative ground for the granting of a petition for modification under section 301(c) of the Act.

Reliable's contention that its Kanes Creek Mine is not gassy and not potentially gassy is the crux of its Petitions. Reliable argues that section 301(c) does not require a finding that the alternative method of measuring methane proposed by a petitioner must have the same degree of refined measurement as

² Although the Bureau and the UMW contended in their briefs that Reliable's Petition in M 71-7 was premature, at oral argument all parties expressed a desire to have a ruling made on the merits of Reliable's Petition.

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the statutory standard, but only requires that a petitioner's proposed alternative achieve the same result as the statutory standard. Reliable contends that, since no methane exists in the Kanawha Creek Mine, a permissible flame safety lamp will guarantee no less than the same protection as a methane detector or a methane monitor since the result of using each device will be the same—a reading of no methane.

The heart of Reliable's appeal is that the Examiner incorrectly concluded that the Act and its legislative history indicate that Congress intended to eliminate the distinction between gassy and nongassy mines for purposes of the application of mandatory safety standards or the modification thereof. Reliable contends that the plain meaning of sections 305(a)(2) and 301(c) of the Act, when read together, indicates that the Act permits a distinction between gassy and nongassy mines and that an operator may have certain standards modified if he can prove that his mine is not gassy and not potentially gassy.

We agree with the Examiner and hold that the Act precludes any consideration in a 301(c) proceeding of whether a mine is nongassy or not potentially gassy because we find that Congress intended that, except where explicitly so provided, there is to be no distinction between mines classified as gassy or nongassy regarding compliance with the mandatory safety standards.

A reading of the legislative history of the Act, as contained in

House Comm. on Ed. and Labor, Legislative History Federal Coal Mine Health and Safety Act, Comm. Print, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Legislative History*], convinces us that it was the intent of Congress to end any distinction between gassy and nongassy mines after the expiration of the extension periods provided for in the Act.

The *Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 91-411, 91st Cong., 1st Sess. (1968)*; *Legislative History* at pages 27, 28 which accompanied the Committee Bill S. 2917, states that:

The [Senate] Committee followed the recommendation of the Department of Interior that all mines be treated alike, in providing these new and additional safeguards to control methane and prevent ignitions.

* * * * *

The report explained why the Committee followed the Department's recommendation:

Thus, the so-called nongassy mines (that have never had an ignition or have never been found to have methane of more than 0.25 percent in the mine atmosphere) have received special treatment under the premise of the 1952 [Act] that a mine need not adopt special measures to control methane and prevent ignitions until there was "evidence of gas." The committee believed, however, that, based on the record, this premise was not valid and therefore reached the decision to treat all mines alike.

* * * * *

It is clear from the history of ignitions and explosions in the Nation's coal mines that the exceptions permitted by the 1952 Federal Coal Mine Safety Act, as

amended, are not warranted. There is neither a scientific nor technical basis for these exceptions. The record shows that no one can predict when gas may be found in sufficient quantity in any mine to cause considerable damage.

During the Full Committee deliberations there was considerable discussion of an amendment proposed by Senator Cooper designed to permit the use of nonpermissible equipment in the nongassy mines by continuing the nongassy classification. The Committee rejected the proposed amendment by a 14-3 vote. See *Legislative History* at 35.

During the Senate debate of the Committee Bill, Senator Cooper offered an amendment which drew a permanent distinction between gassy and nongassy mines for the provisions relating to permissible highpowered electrical face equipment. See *Legislative History* at 397. Senators Williams, Javits, and Randolph offered a substitute amendment to the Cooper amendment. This amendment gave the operators of small nongassy mines three years from the operative date of the Act to meet the requirements for permissible electrical face equipment in by the last open crosscut and an opportunity for the extension of this time for up to two years by the Interim Compliance Panel. See *Legislative History* at 474. Senators Williams and Javits made clear that their substitute amendment was an attempt to accommodate the views of Senator Cooper concerning the financial problems imposed upon small coal

operators by the requirement to obtain permissible equipment.

It is clear that the substitute to the Cooper amendment was designed to provide more time for compliance by these operators and in no way was intended to exclude nongassy mines from ultimate compliance with the standards of the Act. See *Legislative History* at 475-479. During the debate on the substitute amendment to his amendment, Senator Cooper pointed out:

The effect of the substitute amendment, if adopted, would be to remove those [gassy/nongassy] classifications. The amendment is of no substantial benefit at all to the nongassy mines and the small operators. It would only postpone the date of closing mines. *Legislative History* at 481.

The substitute amendment was passed 45-31, and was contained in the final Senate Bill. See *Legislative History* at 482, 530.

The House Committee on Education and Labor held a one day hearing on the proposed House bills at which the gassy/nongassy question was discussed. Congressman Dent, Chairman of the General Subcommittee on Labor, which had the initial drafting responsibility of the House bill, stated at this hearing, "[W]e have eliminated the 'nongassy' classification and therefore presumed that all mines are gassy." *Hearing on H.R. 4047, H.R. 4295, H.R. 7976 Before the House Comm. on Ed. and Labor, 91st Cong., 1st Sess., at 17 (1969).*

There was no discussion of the gassy/nongassy question in the *Re-*

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port of the House Committee on Education and Labor, H. Rep. No. 91-563, 91st Cong., 1st Sess. (1968); *Legislative History* 558. During the House debate on the Committee Bill, Congressman Erlenborn, a member of the General Subcommittee on Labor, stated: "* * * It is contemplated under this bill to eliminate the nongassy classification and to bring all mines under the same requirement for the use of permissible equipment." *Legislative History* at 683.

The Committee Bill, as passed by the House, did contain provisions similar to the Senate Bill regarding the requirements for electrical face equipment. The Bill provided that electric face equipment in mines previously classified as nongassy did not have to be permissible until four years after the operative date of the Act and that the Secretary may waive this requirement on an individual mine basis for a period of two years or waive the requirements on an individual mine basis "* * * [I]f he determines that the permissible equipment for which the waiver is sought is not available to such mine."

Legislative History at 943. This demonstrates that the House recognized the need for extensions of time, if a mine was previously classified as nongassy, due to the difficulties of small operators in obtaining the permissible equipment. The fact that a mine is nongassy *per se* was not the reason for allowing a modification or waiver of the requirements for permissible equip-

ment. See *Legislative History* at 580.

The Statement on the Part of the Managers of the House as to the Bill adopted in conference explained that as to the provisions on permissible electrical equipment (section 305(a)), the conference substitute Bill adopted the language of the Senate bill except for technical changes and changes in the time requirements. See *Legislative History* at 1045. The analysis of the Conference Bill submitted to the Senate by Senator Williams, the ranking Conference Manager for the Senate, states that section 305 (a) "* * * [E]liminates the distinction between gassy mines and the so-called non-gassy mines." See *Legislative History* at 1130.

Reliable contends that section 301 (c), which was not contained in the Senate Bill, was placed in the House Bill and the Conference Bill with the specific intent that this section permits an operator to obtain a modification of the application of a safety standard on the basis that there is no potential for gas accumulations in the operator's mine. We find nothing in the Act or its legislative history to support this construction of section 301(c).

Thus, the legislative history of the Act does not support Reliable's position that Congress envisioned a permanent distinction between gassy and nongassy mines. We agree with the Examiner's conclusion that Congress has determined that all mines are potentially gassy. The Examiner was bound by this Con-

gressional determination, and therefore did not err by not deciding whether the Kanes Creek Mine is potentially gassy.

We therefore reject Reliable's sole basis for its contention that the granting of its Petitions would guarantee no less than the same measure of protection to the miners in the Kanes Creek Mine.

As an alternate argument on appeal of the Examiner's decision in M 71-7, Reliable argues that the Examiner erred in concluding that the use of a methane monitor on the continuous miner in the Kanes Creek Mine would not result in a diminution of safety to the miners.

Reliable argues that a malfunctioning methane monitor can de-energize a continuous miner machine at the moment the machine operator becomes aware that he should remove his machine from an area due to a danger, such as a roof fall, and that when this happens the machine operator will remain with his machine and be exposed to this danger. Although one of Reliable's witnesses testified to that effect, we find this argument untenable.

Reliable also argues that the expense of providing methane monitors will diminish funds which should be used on more necessary safety equipment, and that this results in a diminution of safety to the miners. Reliable failed to specify the standards of the Act with which it would be unable to comply if it had to meet the expense of providing methane monitors. Furthermore, the lack of funds to comply

with the mandatory standards of the Act is not a relevant basis for granting a 301(c) petition.

Therefore, we hold that Reliable's Petitions for Modification were properly denied by the Examiner.

With regard to the Application for Review proceeding (docketed below as HOPE 71-109), we hold that it was proper for the Examiner to receive the Notice of Abatement into evidence. An Examiner may take official notice of Departmental public records. 43 CFR 4.24(b). Moreover, although Reliable claims that the Examiner reopened the record for the Bureau but not for Reliable, we note that Reliable never actually requested the Examiner to enable it to offer objections to the admission of the Notice of Abatement.

We also hold that the Examiner properly dismissed Reliable's Application for Review. The Bureau found that the alleged violation which was the subject of Reliable's Application for Review had been abated. We held in *Reliable Coal Corp.*, *supra*, that where the Bureau finds that a violation charged in a notice of violation is totally abated, an application for review of the alleged violation is subject to dismissal.

Although the Examiner properly dismissed Reliable's Application for Review, in view of our recent decision in *Gateway Coal Company*, 1 IBMA 82, 79 I.D. 102 (1972), and for purposes of guidance in future cases, we think that it is appropriate for the Board to comment briefly

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upon the relief available to an operator while his petition for modification under section 301(c) is pending.

In the *Gateway* case we held that the Departmental Hearing Examiners and the Board have implied authority under section 301 (c) to grant interim relief to an operator, pending the administrative adjudication of his petition for modification, by restraining the Bureau from enforcing the abatement and mine closure provisions of section 104(b) of the Act.

Section 105(a) of the Act permits an operator to seek review of a notice of violation if he believes that the time fixed for abatement of the violation is unreasonable. Under our current procedures an operator may request an expedited hearing, if necessary, to obtain review of a notice of violation within the time for abatement fixed in the notice. See 43 CFR 4.514; *Reliable, supra* at 64 and 78 I.D. 206-207 (1971). The determination of a "reasonable time for abatement" in any given case involves a consideration of several factors, some of which we discussed in *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149 (1970).³

We think that the filing of a petition for modification by an operator should be a major consideration in determining the reasonableness of the time set for abatement of any

alleged violation which relates to the safety standard sought to be modified. Where an operator contends in an application for review that the time set for abatement in a notice of violation should be extended until after a ruling on the merits of his petition for modification, in addition to the factors mentioned in *Freeman, supra*, the Examiner or the Board should consider the factors set forth in *Gateway, supra*. As applied to a section 105(a) proceeding this requires consideration of: (1) Whether the operator's petition for modification was filed in good faith and not for the purpose of postponing or avoiding abatement, (2) whether prior to the time fixed for abatement the health and safety of the miners will be reasonably assured, (3) whether the operator will suffer irreparable harm if an extension of the time fixed for abatement is not granted.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (211 DM 13.6; 35 F.R. 12081), IT IS HEREBY ORDERED, that the DECISIONS of the Examiner denying both Petitions for Modification and dismissing the Application for Review are AFFIRMED.

DAVID DOANE, *Member.*

I CONCUR:

C. E. ROGERS, JR., *Chairman.*

³ In *Freeman, supra*, 77 I.D. 163, 164 (1970), we stated that some of these considerations are (1) the safety of miners, (2) the availability of equipment, and (3) the difficulty of abatement.

April 18, 1972

ELDON L. SMITH**5 IBLA 330**

Decided April 18, 1972

Appeal from decisions (Arizona 1-69-1, Arizona 1-70-1, Nevada 5-70-1) denying issuance or renewal of grazing licenses or permits until payment of outstanding trespass damages has been offered.

Affirmed.**Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Appeals**

When consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed.

Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Trespass

Where an applicant for grazing privileges has failed to pay assessed damages for a grazing trespass which assessment has been affirmed by the Secretary of the Interior, a district manager properly conditioned approval of the applicant's application upon payment of his outstanding trespass damages. No license or permit will be issued or renewed until payment of any amount found to be due has been offered.

Res Judicata—Rules of Practice: Appeals: Generally

Where an appeal has been taken and a final Departmental decision has been

rendered thereon, the principle of *res judicata* will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim, and the same issues.

Administrative Procedure: Judicial Review—Courts—Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses: Trespass—Judicial Review—Rules of Practice: Appeals: Effect of

The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed.

APPEARANCES: Eldon L. Smith, pro se.

**OPINION BY
MRS. THOMPSON
INTERIOR BOARD OF LAND
APPEALS**

Eldon L. Smith has filed three separate appeals from three different decisions: one is by the Office of Appeals and Hearings, Bureau of Land Management, affirming a decision by a hearing examiner; the other two are by a hearing examiner. All of the decisions arose from initial decisions by a district

manager denying his applications for grazing licenses until damages for a grazing trespass have been paid.¹ Since the issues involved in each appeal are common to the others, the appeals are consolidated for the purpose of this decision.

Appellant's contentions in these appeals are general and vague. Nevertheless, in this decision we shall attempt to make some order out of the confusion in his appeals to resolve the issues insofar as they may be gleaned from his statements.

The genesis of each appeal is in the Secretarial decision, *Eldon L. Smith, A-30944* (October 15, 1968), which affirmed the assessment of trespass damages for a grazing violation. Appellant sought judicial review of the Secretary's decision by filing a complaint in the United States District Court for the District of Arizona. The District Court granted a motion to dismiss the complaint in an unpublished decision, *Smith v. Hickel, et al.*, Civil No. 69-245, on February 3, 1970.

The Arizona appeals originated from applications which appellant made for grazing privileges for the 1970 and 1971 grazing seasons on the Black Willow and Tasi

Springs allotment of the Arizona Strip grazing district. This area was formerly part of the Pakoon Special Rule Area. However, the Special Rule was revoked and the district manager adjudicated grazing privileges pursuant to the Federal Range Code. Appellant had appealed this allocation of grazing privileges and the appeal was pending before the Secretary at the time he made application for the 1970 and 1971 grazing seasons.²

The district manager, in both of the Arizona decisions, partially granted appellant's applications, but conditioned his approval upon payment of the outstanding trespass damage as assessed by the Secretary's October 15, 1968, decision, *supra*. Where appellant had applied for grazing privileges in excess of the grazing capacity as determined by the district manager before the appeal on the Pakoon Special Rule Area adjudication had commenced, the district manager rejected the applications. In the second Arizona case, appellant was denied the opportunity to protest the adverse recommendation of the advisory board, because the same issues were

¹ Since the time each of the appeals was filed, the appellate procedure of the Department was reorganized. The Office of Appeals and Hearings was eliminated as an intermediate appeal office, and all appeals pending before it were transferred effective July 1, 1970, to the newly created Board of Land Appeals. Cir. 2273, 35 F.R. 10009, 10012 (June 18, 1970). The Secretary also delegated to the Board of Land Appeals the authority to adjudicate all cases pending before him. *Id.* Accordingly, each appeal has been transferred to the Board of Land Appeals.

² The Board of Land Appeals, has since rendered a decision adjudicating grazing privileges in the Pakoon Special Rule Area. The Board held in *Delbert and George Allan, Eldon L. Smith et al.*, 2 IBLA 35, 78 I.D. 55 (1971), that the award of grazing privileges by the Bureau of Land Management in the Special Rule Area was correct. While this decision was pending, Smith had sought review of the Office of Appeals and Hearings decision, in conjunction with his appeal of the Secretarial decision, *Eldon L. Smith, supra*, in the Federal District Court of Arizona. As previously noted, his suit was dismissed

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involved in prior appeals and had been adjudicated previously.

Appellant, in successive years, appealed the decisions of the Arizona district managers to the hearing examiner. On the motion of the state director that appellant had not clearly and concisely set out the errors in his appeal, 43 CFR § 1853.1 (d), *now* 43 CFR § 4.470(d), the hearing examiner dismissed the appeals.

Prior to the reorganization of the Department's appellate procedure, the first Arizona decision was reviewed by the Office of Appeals and Hearings, Bureau of Land Management. The second Arizona decision was transferred to this office for review.

In his appeal to the Office of Appeals and Hearings, appellant maintained that the hearing examiner erred when he did not consider whether he was entitled to a grazing license. He argued that an appeal suspends the effect of a decision from which it is taken pending final action on the appeal. 43 CFR § 1853.8(a), *now* 43 CFR § 4.477(a). He alleged that judicial review of the Secretary's decision, *Eldon L. Smith, supra*, which assessed trespass damages, had been prevented by delay tactics on the part of the United States' attorneys. He petitioned the Director for restoration of his privileges pending a final decision and judicial review of the issue.

The Office of Appeals and Hearings noted that appellant had an ap-

peal pending before the Secretary from one of its previous decisions which involved parts of the area in controversy, *i.e.*, the Pakoon Special Rule Area. Thus, it refused to reopen a matter it had previously adjudicated while an appeal therefrom was pending. Although appellant claimed that he was deprived of his grazing privileges while his appeal was being adjudicated, the Office pointed out that appellant's application had been approved for the established capacity of the land subject to payment of the outstanding trespass damages. It observed that there was no reason to grant privileges in excess of the established grazing capacity while an appeal was pending. It held that 43 CFR § 9239.3-2(d) precluded the issuance or renewal of grazing permits when payment had not been offered for the amount owing to the United States for trespass damages.

In the Nevada case, the district manager rejected Smith's application for grazing privileges until his grazing fine was paid. Smith's appeal from this decision was dismissed by a hearing examiner on the ground there was no justiciable issue.

Appellant's appeals from the district manager's decisions failed to specify clear grounds of error and any reasons pointing to factual issues warranting hearings in this case. Therefore, the action taken by the hearing examiner in dismissing his appeals was proper.

As far as can be determined from

appellant's vague contentions in the appeals from the hearing examiner and Office of Appeals and Hearings' decisions, appellant seems to be raising two primary questions namely:

1. Does the failure to pay assessed damages for a grazing trespass constitute grounds to deny the issuance or renewal of a grazing license or permit?

2. Does an appeal suspend the effect of the decision from which it is taken pending final action on the appeal?

Before considering these questions, we note that when consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed. *W. Dalton LaRue, Sr., and Juanita S. LaRue*, A-30391 (March 16, 1966).

The first question has bearing on future actions affecting the award of any grazing privileges to appellant. Therefore, it will be resolved. The second question raises an issue which warrants some clarification in view of the history of the actions taken here.

With respect to the first question concerning the effect of a failure to pay trespass damages, the Secretary has been delegated the authority to provide " * * * for the protection, administration, regulation, and improvement of * * * grazing districts * * *." 43 U.S.C. § 315a

(1970.) Pursuant to this authority 43 CFR § 9239.3-2 has issued. It clearly provides that "[a] grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation * * *." In particular, "[n]o license or permit will be issued or renewed until payment of any amount found to be due the United States * * * has been offered" 43 CFR § 9239.3-2(d).

We conclude that the district managers properly held, as did the Office of Appeals and Hearings, that no license or permit would be issued or renewed until payment of the outstanding trespass damages had been offered.

As to the second question concerning the effect of Smith's appeals, the district manager's decisions were rendered after there was a final administrative action on the appeal of assessed trespass damages by the Secretary's decision of October 15, 1968, *Eldon L. Smith, supra*.

Ostensibly, appellant's position is that because he sought judicial review of the Secretary's decision, it was improper for the district managers to condition his subsequent applications upon payment of the outstanding trespass damages. Actually, this question is now moot because appellant failed to gain any relief in his court action. We note that in each of these appeals, appellant appears to be trying to raise issues which have been adjudicated previously. Final action on the trespass damages has been taken by the Secretary's decision, *Eldon L.*

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Smith, supra. Final action has been taken on the adjudication of grazing privileges of the Pakoon Special Rule Area by the Board of Land Appeals, *Delbert and George Allen, Eldon L. Smith, et al., supra*. Judicial review of both these cases has been denied. The doctrine of *res judicata* bars consideration of appeals arising from later proceedings when the same parties, lands, claims, and issues are involved. *Malvin Pedroli, et al.*, 75 I.D. 63 (1968). *Of.*, *The Dredge Corporation*, 3 IBLA 98 (1971); *United States v. J. S. Devenny*, 3 IBLA 185 (1971), and cases cited therein. This bars further consideration of such issues.

For clarification, should a similar situation arise again, we shall offer a few comments concerning appellant's contention that it was improper for the district manager to condition allowance of grazing privileges on payment of outstanding trespass damages "during an appeal and before a judicial review or court action has been taken" or before the decision had been made immediately effective. He refers to regulation 43 CFR 1853.8(a) and (b), in effect when his appeals were taken. These provisions are now renumbered, with only minor changes to conform to the revised appellate structure in the Department, as 43 CFR 4.477 (a) and (b) (1972). They provide that an appeal shall suspend the effect of the decision from which it is taken pending final action on the appeal, and expressly that an appellant who was granted

grazing privileges in the preceding year may continue to use such privileges pending final action on the appeal unless the decision appealed from is made immediately effective.

Since the Department rendered a final decision on the question of trespass damages, appellant cannot use these regulatory provisions to circumvent the effect of 43 CFR 9239.3-2(d), requiring the denial of grazing privileges until the fine is paid. An appeal from the denial of privileges based upon a final Departmental decision assessing the fine cannot serve to suspend the denial since it is based upon a matter already finally adjudicated within the Department. In other words, by dilatory appeal actions appellant cannot prevent this Department from its most practical means of assuring that the fine is paid. (See further discussion of this point, *infra*).

As to the court action, the regulations providing for the suspension of a decision pending an appeal, are only applicable where appeals are taken within this Department. They are part of the rules of practice governing appeal procedures within the Department. Once a final Departmental decision has been rendered deciding a matter under these provisions, there is no further suspension of the initial decision which was the subject of the appeal. Therefore, the filing of a court action does not automatically suspend the effect of a decision. Congress, by 5 U.S.C. § 705 (1970), has expressly provided for certain relief from the ef-

fect of administrative actions pending judicial review. That provision provides that such relief may be granted by the administrative agency or a court in appropriate circumstances as follows:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, * * * may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

By the discretionary authority granted by this statute or the general supervisory discretion of the Secretary, which may now be exercised by this Board, the effect of a decision may be suspended during the pendency of court action. We believe, however, that good reasons for such a suspension should be shown by the litigant in a request to the Department. Appellant here failed to show such reasons in these cases. Also, in determining whether justice requires the suspension of the effect of a decision, all factors bearing upon the particular factual situation may be considered.

We come now to the question of whether the institution of court proceedings to review a final decision of the Department assessing grazing trespass damages should be considered as barring further action by this Department based upon the assessment of such damages, and specifically whether this Department will refuse to grant privileges be-

cause of the failure to pay such damages. Unless a court so orders, we believe the answer should be that until and unless a court finds that such an assessment was improper and there is no trespass fine due and owed to this Department, a grazing applicant's failure to pay the assessed damages will serve as a bar to the issuance of any grazing privileges to him in similar circumstances to this case. The reason for this is very simple. This Department has an obligation to protect the federal range. Imposition of fines for trespass is a means of enforcing rules and regulations governing the use of the range. Grazing privileges may also be permanently reduced as a disciplinary measure if there are repeated trespasses. See *Alton Morrell and Sons*, 72 I.D. 100 (1965). To assure that payment of trespass fines is made, this Department has no practical recourse against the user except timely and expensive court action unless it withholds the granting of grazing privileges, which it may do under the discretionary authority of the Taylor Grazing Act, 43 U.S.C. sec. 315 (1970). A grazing applicant may pay the fines under protest and, thereafter, seek judicial review of the assessment. If he is successful, the Government would refund the money paid under protest. He, therefore, will suffer no irreparable injury by paying the fine. If he is not successful, the matter is ended. We do not believe justice requires this Department to ignore its assessment of trespass damages where

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that assessment is challenged in a court proceeding.

Appellant has contended generally that he has been deprived of his Constitutional right. There is no merit to this general, unsupported statement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions appealed from are affirmed.

JOAN B. THOMPSON, *Member.*

WE CONCUR:

MARTIN RITVO, *Member.*

DOUGLAS E. HENRIQUES, *Member.*

UNITED STATES

v.

MELVIN McCORMICK

5 IBLA 382

Decided April 28, 1972

Appeal from the Bureau of Land Management land office decision A-4497 declaring mining claims null and void.

Affirmed.

Mining Claims: Contests—Rules of Practice: Government Contests

Under the Department rules governing government contests against mining claims, a contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and where he fails timely to file an answer to the allegations of the complaint, they will be taken as admitted and the mining claim which is subject of the contest is

properly declared null and void without a hearing where one of the charges in the complaint alleges no discovery of a valuable mineral deposit.

Mining Claims: Generally

Section 2322, Revised Statutes, 30 U.S.C. sec. 26 (1970), does not by its terms grant any right to the wife of the locator or a subsequent claimant either present or contingent in an unpatented mining claim.

Rules of Practice: Government Contests—Words and Phrases

"Community Property." With respect to unpatented mining claims in states recognizing community property laws, the husband represents the community interest of himself and also his wife, and as to such interest the wife is considered to be in privity with her husband, and where a government contest is brought against such an unpatented mining claim with only the husband named in the notice of contest and complaint, the wife is represented in said cause as though she had been expressly made a party thereto.

APPEARANCES: William N. Hackenbracht, for the appellant; Richard L. Fowler, attorney in charge, Office of the General Counsel, U.S. Department of Agriculture, for the government.

OPINION BY MR. HENRIQUES INTERIOR BOARD OF LAND APPEALS

This is an appeal from the decision of the Arizona land office, Bureau of Land Management, dated March 9, 1970, declaring the Too High placer mining claim and the Up in the Sky placer mining claim null and void for the reason that the contestee failed timely to

file an answer after he properly had been served with a copy of a contest complaint.

The record recites the Too High placer mining claim was located on October 29, 1953, by Melvin McCormick and N. B. Forehand on land within the Coconino National Forest, Coconino County, Arizona. The Up in the Sky placer mining claim was located on the same day on contiguous land by Melvin McCormick only. Both claims are properly recorded in Coconino County, Arizona. N. B. Forehand died on January 20, 1960, and his wife, Roberta Forehand, was declared to be his legal heir by the Superior Court of Coconino County. Mrs. Forehand deeded her interest in the Too High claim to Melvin McCormick on November 20, 1965, by quitclaim deed which was duly recorded in Coconino County on January 7, 1966. The State Director, Bureau of Land Management, initiated a contest at the request of the Forest Service, United States Department of Agriculture, naming Melvin McCormick as contestee and charging among other things that a valid discovery, as required by the mining laws of the United States, does not exist within the limits of the Too High and the Up in the Sky placer mining claims. Service was effected on Melvin McCormick by certified mail, which was received and signed for by him on January 20, 1970. The notice carried a specific caveat that unless the contestee filed an answer to the allega-

tions within 30 days after service of the notice and complaint, the allegations of the complaint would be taken as admitted and the case decided without a hearing as provided by regulation. McCormick filed an answer, through counsel, on February 24, 1970, more than 30 days after service of the notice and complaint. On March 9, the land office issued its decision declaring the subject mining claims null and void and the contest closed. McCormick then appealed to this Board.

In essence McCormick contends that the mining claims in question were community property and as such his wife owned a half interest in the same and so was entitled to be named as a party contestee in the complaint; that failure to name Hilde McCormick, his wife, rendered the complaint subject to summary dismissal, citing among other things, the Department regulations relating to contests 43 CFR Subpart 1852 (*now* 43 CFR Subpart 450 (1972)).

The location of a mining claim is an appropriation of federal land for private use, so it must conform to the dictates of federal law. In *Black v. Elkhorn Mining Company*, 163 U.S. 445 (1896), the Supreme Court stated, after reciting the rights given to locators under section 2322 [Revised Statutes] (30 U.S.C. sec. 26 (1970)):

[I]t [Sec. 2322] does not by its terms grant any right to the wife of the locator either present or contingent.

Id. at 448. See also *Bradford v. Morrison*, 212 U.S. 389 (1909), an ap-

peal from the Supreme Court of Arizona.

Although a woman, as a citizen of the United States, may *in propria persona*, locate mining claims pursuant to R.S. 2319, 30 U.S.C. sec. 22 (1970), unless she is specifically named in the notice of location or in a subsequent deed transferring title to an unpatented mining claim, the wife of the locator or claimant to an unpatented mining claim need not be recognized by the United States as having any rights in or to an unpatented mining claim or being entitled to notice and an opportunity to be heard under due process in any proceeding against such unpatented mining claims owned in whole or in part by her husband. *Black v. Elkhorn Mining Company, supra*.

Further, we find no basis for reversing the decision of the land office since the courts in states recognizing community property, have consistently held, with respect to such community property, that the husband represents the community interests of himself and also his wife, and as to such interest the wife is considered to be in privity with her husband and is represented in actions affecting such community property as though she had been expressly made a party thereto. See *Lichty, et ux v. Lewis, et ux*, 77 F. 111 (9th Cir. 1896); *Cutting v. Bryan, et al.*, 274 P. 326 (Sup. Ct. Calif. 1923). The husband is the head of the community and invested by statute with the power to manage and dispose of the community as-

sets. *Barcon v. School District No. 40, Miami Area Schools, Miami, Arizona, et al.*, 441 P.2d 540 (Sup. Ct. Ariz. 1968); *Pendleton v. Brown*, 221 P. 213 (Sup. Ct. Ariz. 1923). *Of. King v. Uhlmann*, 437 P.2d 928 (Sup. Ct. Ariz. 1968).¹

A review of the facts in this case clearly shows that no rights of Hilde McCormick have been prejudiced in any way by failure of the Bureau of Land Management to name her as a party to the complaint against the Too High and the Up in the Sky placer mining claims.

Appellant has requested permission to present oral argument in this matter. The evidence of record affords a sufficient basis upon which to rest our conclusion. Oral argument would serve no useful purpose. Accordingly, the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

DOUGLAS E. HENRIQUES, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

¹ 11 Ariz. Rev. Stats. Anno. § 33-452 provides:

"A conveyance or incumbrance of community property is not valid unless executed and acknowledged by both husband and wife, except unpatented mining claims which may be conveyed or incumbered by the spouse having the title or right of possession without the other spouse joining in the conveyance or incumbrance."

STEENBERG CONSTRUCTION COMPANY

IBCA-520-10-65

Decided *May 8, 1972*

Appeal under Contract No. 14-06-D-4872

Specifications No. DC-5935

Lost Creek Dam, Weber Basin Project
Bureau of Reclamation

Sustained in part—dismissed in part.

Rules of Practice: Appeals: Generally—Contracts: Disputes and Remedies: Appeals—Rules of Practice: Appeals: Hearings

In the absence of a Board rule requiring that the Board member who presided at the hearing of an appeal prepare or participate in the decision, the failure of the Board to assign the preparation of an opinion to a retired, former member who conducted the hearing is not a violation of a contractor's constitutional rights, even where credibility and the demeanor of witnesses are in issue, since procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the members of the Board rendering the decision.

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Breach—Rules of Practice: Appeals: Dismissal

Where an appeal record disclosed the existence of various disputes clearly cognizable under specific provisions of a contract for the construction of a dam, the Board is not deprived of jurisdiction over such disputes by virtue of the contractor's contention that they merged

into and became part of a unitary, integrated claim for a "cardinal breach" arising out of the Government's course of conduct for which only the Court of Claims could grant adequate relief, since it is not for a board of contract appeals to determine that the cumulative effect of claims redressable under various contract clauses, combined with other acts and non-acts of the Government traditionally regarded as breaches of contract, constitute a unitary, integrated claim for a breach of contract.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications

Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government first erroneously staked the depth of the trench to 28 feet and thereafter to 42 feet before rock was ultimately reached at 60 feet, and the contracting officer issued a change order to compensate the contractor for certain additional expenses caused thereby, including the increased cost of dewatering the trench at the specified depth, but refused to provide for the increased cost of back-filling on the ground that the contractor was charged at the prebidding stage with the knowledge that backfilling would be required at the 60 foot depth, the contractor was also entitled to an equitable adjustment for its additional cost of backfilling resulting therefrom. The issuance of the change order constituted an acknowledgement of Government responsibility for the direct consequences of the erroneous staking and it was therefore inconsistent to include the dewatering costs but not to compensate for the backfilling as well.

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Contracts: Construction and Operation: General Rules of Construction—Contracts: Construction and Operation: Drawings and Specifications

A provision, under a contract for the construction of a dam, a key feature of which called for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be 60 feet), which permitted the Government to vary the slopes, grades or dimensions of the excavations from those specified when necessary or desirable was not intended to apply to major revisions associated with correcting the erroneous staking of the trench to depths of 28 feet and 42 feet, respectively, where the serious difficulties encountered in reaching the depth specified could not be regarded as having resulted from a mere variation.

Rules of Practice: Evidence—Rules of Practice: Witnesses—Rules of Practice: Appeals: Hearings

Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government erroneously staked the depth of the trench before rock was ultimately reached at 60 feet, and the contracting officer issued a change order to compensate the contractor, *inter alia*, for the increased cost of dewatering the trench, the contractor contended that the amount allowed was inadequate, answers by an officer of the contractor to interrogatories propounded in a lawsuit against it by the dewatering sub-subcontractor arising out of this work, which refer to the failure and inadequacy of the sub-subcontractor's dewatering equipment and plan of dewatering are admissible as judicial admissions against interest by the contractor on the question of the contractor's entitlement to further

compensation for dewatering difficulties allegedly resulting from the erroneous staking.

Contracts: Disputes and Remedies: Appeals—Contracts: Disputes and Remedies: Jurisdiction—Contracts: Disputes and Remedies: Burden of Proof

A claim to compensate a contractor, for the cost of additional grouting delayed is dismissed where there is insufficient evidence in the record to support a finding that the grouting work was changed by the erroneous staking of a cutoff trench since the delay in grouting was caused by the delay in completing excavation of the trench for which no relief is available under the contract, in the absence of a suspension of work clause.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras

Under a provision relating to borrow operations, of a contract for the construction of a dam, which required the contractor to (i) develop and submit for approval a plan for the production of proper proportions of Zone 1, 2 and 3 materials and (ii) irrigate Zone 1 material in borrow pits at least 30 days prior to anticipated use, and which authorized the Government to designate limits or locations of borrow pits in the borrow areas designated, upon a failure of the contractor to submit such a plan prior to commencement of borrow operations and to irrigate 30 days in advance, the Government was entitled to issue directions for the development, use and irrigation of the borrow areas and such directions did not constitute a compensable change or relieve the contractor of its contractual responsibilities.

**Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: General Rules of Construction—
Contracts: Construction and Operation: Changed Conditions**

Where a contract for the construction of a road indicated that the material to be excavated in roadway excavation was unclassified and the specifications and logs of exploration of test pits referred to the existence of rock at the site, a contractor was unwarranted in assuming that roadway excavation came within the definition of common excavation, which excluded rock, and that rock would not be encountered in such excavation.

**Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Changed Conditions**

A contractor under a contract for the construction of a road, which alleged that it was prejudiced by the Government's failure to disclose the existence of mass-haul diagrams showing the location and quantities of excavation, fill and waste, but which made no inquiry therefor, was not warranted in assuming by virtue of a contract drawing of a "typical" section with cut and fill approximately balancing, the roadway as constructed would be a balance half-cut, half-fill, "simple" road, where a profile drawing of the roadway revealed numerous sections of cuts and fills at centerline, the contract provided for payment for overhaul of excavation for the roadway beyond a free haul distance of 1,000 feet, and an adequate site investigation and examination of other contractual data all should have indicated to the contrary, since a typical section by accepted practice is not intended to

show a specific relationship between the amounts of cut and fill to be expected at a given location.

Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Changes and Extras—Contracts: Formation and Validity: Mistakes—Contracts: Disputes and Remedies: Jurisdiction

Where a contractor under a contract for the construction of a tunnel, which provided that cavities or fissures may be encountered, in the course of excavation in limestone found and was required to fill in solution caverns (the presence of which in limestone is common) with grout and grout sand, the existence of such caverns did not constitute a changed condition. Utilization of the grout and grout sand, rather than concrete, to fill in the voids was contemplated by the contract and was not an attempt by the Government to take unreasonable advantage of the contractor's erroneously low bid for grout sand, the correction of which is beyond the Board's jurisdiction.

Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Evidence

Where a contractor under a contract calling for the construction of a tunnel and an access shaft extending 200 feet downward from ground surface to the gate chamber in the tunnel excavated the shaft by means of blasting, and subsequently the Government redesigned the shaft, in part due to a funnel-shaped excavation caused by the contractor's blasting technique, the contractor is not entitled to be compensated for the cost of refilling the funnel-shaped excavation since the record does not establish that such cost is attributable to a changed condition rather than to the contractor's blasting methods.

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Rules of Practice: Evidence—Rules of Practice: Appeals: Hearings

During an appeal taken under a contract for the construction of a tunnel, where the accuracy of certain benchmarks established by the Government is in issue, a survey performed by the Government after the work was completed in the course of the hearing of the appeal is admissible into evidence, since a substantial identity between the conditions which actually existed at the time the controversy arose and the subsequent conditions was established.

Rules of Practice: Evidence—Rules of Practice: Appeals: Hearings

In an appeal in which the quantity of open cut excavation performed by a contractor is in issue, where the contractor has introduced into evidence a series of 28 plats with an explanation purporting to demonstrate Government survey errors relating to open cut excavation, Government analyses of such documents are admissible. Since a contract appeals board has substantial latitude in the area of admission or exclusion of evidence, where the Board must deal with a complex, voluminous record, the Board will exercise that discretion and admit into evidence those items that appear designed to enhance its understanding of the issues and to assist it materially in the performance of its functions.

Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Drawings and Specifications

Under a contract for the construction of a dam and other related work, providing that a certain borrow area contained materials of a quality suitable for processing to meet the requirements of the specifications for coarse aggregate, and authorizing the contractor to furnish such material from other sources, the con-

tractor's claim for the costs of processing such material, submitted on the theory that the Government misrepresented the suitability of the specified source and that the condition of the borrow area differed materially from that indicated in the contract, is denied, since processing was expressly contemplated by the contract and the contractor neither sought nor needed to procure such material from the other available sources.

Contracts: Construction and Operation: Contracting Officer—Contracts: Disputes and Remedies: Appeals—Rules of Practice: Appeals: Generally

Where in the course of an extended hearing of an appeal by a contractor under a contract for the construction of a dam and related work, substantial testimony was taken, accompanied by the introduction of numerous exhibits, without objection by the Government, in connection with certain claims relating to allegedly harsh and unworkable concrete ordered by the Government, only some of which were expressly considered by the contracting officer in his various findings of fact, a remand of the unconsidered claims to the contracting officer for additional findings is not required.

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications

A contract for the construction of a dam and other related work which afforded the Government the right to design, test, adjust and control the concrete mixes necessary for construction, should be regarded as containing an implicit requirement that such right be exercised with reasonable regard for the pumpability and placeability of the mixes designed. Where the record established that the Government did not take those factors sufficiently into account with respect to

certain mixes, a constructive change occurred and the contractor is entitled to be compensated for the delay and disruption of its work resulting therefrom.

Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Construction and Operation: Drawings and Specifications

A contractor whose work was disrupted and damaged as a result of the bursting of an oil pipeline (owned by a third party), which ran under the contract site and over which the contractor had, with the Government's approval, located its concrete batching plant, was not entitled to be compensated by the Government for the damage sustained on the ground that the damage resulted from the Government's failure to discharge its implied contractual obligation to provide a proper and safe construction site, in the absence of proof that the Government was responsible for the bursting, since the contractor bore the risk of loss under the Permits and Responsibilities clause of the contract.

Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Evidence—Rules of Practice: Appeals: Generally

A contractor in an appeal having a massive record, who alleges instances of inadequate payment under a contract for the construction of a dam, and in support thereof introduces into evidence various Government payment books unpaginated and some seven inches in thickness without clearly establishing such allegations by further specification or identification in such books, has not sustained its burden of proof, since it was not incumbent upon the Board to search the record

"for errors that may be lurking among the labyrinths."

Contracts: Construction and Operation: Payments—Contracts: Disputes and Remedies: Termination for Default

A contractor under a contract for the construction of a dam, which provides that progress payments will be made to the contractor on estimates approved by the contracting officer, was not entitled to discontinue work on the ground that the Government's progress payments were allegedly erroneous and inadequate since implicit in the term "estimate" is lack of finality and the possibility of further revision. Where the parties are in serious disagreement over the validity of claims submitted by the contractor or as to the amounts owed for changes, extra work, etc., it is to be expected that progress payments will correspond to the amounts which the contracting officer determines are owed by the Government.

Contracts: Disputes and Remedies: Termination for Default—Contracts: Performance or Default: Breach

Where a contractor discontinued its work under a contract for the construction of a dam because the Government had allegedly breached the contract by failing to (1) make timely and adequate payments, (2) process claims promptly, (3) consider the claim on a unitary basis, and (4) grant adequate relief, the contracting officer was justified in terminating the contract for default, since a contractor is not permitted under the Disputes clause to abandon its work because of disagreement with the contracting officer's determinations and the record establishes that payments were made in accordance with the contract and the delay in processing claims and providing administrative relief was found to be largely attributable to the actions of the contractor.

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Contracts: Disputes and Remedies: Equitable Adjustments—Rules of Practice: Evidence

Recovery by a contractor under a contract for the construction of a dam who alleged that all of its claims against the Government were inseparable and that payment should be made on the basis of its total expenditures less contract receipts is denied where the contractor's records were such that allocation of costs to specific claims could be made and the reasonableness of such total costs and the Government's responsibility therefor were not established. In such circumstances the Board found that resort to the jury verdict approach for determining the amount of the equitable adjustment was warranted, since the Government's evidence respecting costs was also not segregated to specific claims.

Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Construc- tion and Operation: General Rules of Construction

A contractor under a contract for the construction of a dam whose claims fall within the purview of the Changes and Changed Conditions clauses and who asserts that its records provide a proper basis for evaluating costs of labor and materials but that its equipment records are incomplete, is not entitled to recover such equipment costs pursuant to a clause of the contract providing that any allowance for equipment used in performing extra work shall be determined from the schedule of average ownership expense listed in "Contractors' Equipment Ownership Expense" published by the Associated General Contractors of America, where the provision also states that the application of such allowances to changes ordered pursuant to the Changes and Changed Conditions clauses is optional

with the contracting officer and the evidence in the record provides a more suitable basis for establishing the contractor's equipment costs.

APPEARANCES: B. W. Hart, Attorney at Law, Moore, Costello & Hart, St. Paul, Minn., B. C. Hart, Jonathan H. Morgan, Attorneys at Law, Briggs & Morgan, St. Paul, Minn., for the appellant; John R. Little, Jr., David J. Askin, Department Counsel, Denver, Colo. for the Government.

OPINION BY MR. SHERMAN P. KIMBALL * INTERIOR BOARD OF CONTRACT AP- PEALS

On June 24, 1963, the Bureau of Reclamation awarded a contract to the appellant in the amount of \$2,053,000.07, for the construction

*The appellant has objected to the failure of the Board to assign the preparation of this opinion to Mr. Thomas M. Durston, a former member of the Board, who retired in 1968 and who served as hearing official. The Board rules do not require that the hearing member prepare or participate in the decision. It is well-settled that a litigant before a board has no constitutional right to a decision by the official who presided at the taking of the testimony, even where credibility and the demeanor of witnesses are in issue. *Estate of Varian v. Commissioner of Internal Revenue*, 396 F.2d 753 (9th Cir. 1968), cert. den., 393 U.S. 962 (1968); *Utica Mutual Insurance Company v. Vincent*, 375 F.2d 129 (2d Cir. 1967), cert. den., 389 U.S. 839 (1967); *Anthony P. Miller, Inc. v. United States*, 161 Ct. Cl. 455, 474 (1963); *Racine Screw Company v. United States*, 156 Ct. Cl. 256, 258 (1962). Procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the Board. *Keco Industries, Inc.*, ASBCA Nos. 12729, 13271 (September 1, 1970), 70-2 BCA par. 8455; *Blake Construction Company, Inc.*, GSBCEA No. 2851 (March 11, 1970), 70-1 BCA par. 8178. That is the usual practice of this Board; it was scrupulously followed in this appeal.

of Lost Creek Dam, in the Wasatch Mountains, Morgan County, Utah, approximately 30 miles east of Ogden.¹ The contract provided principally for the construction of an earthfill dam embankment to be used for storage, a spillway outlet works, and certain roadwork.

The dam embankment called for was to be approximately 1,140 feet long at the crest and to reach a height of approximately 190 feet above the bed of Lost Creek. In the rock surface at the bottom of the cutoff trench a grout cap was to be placed, and a grout curtain constructed in the rock foundation. A single grout curtain was to be constructed through the spillway upstream cutoff.

The specifications also called for the dam embankment to be divided into three zones of earth, suitable material for which was to be obtained from designated borrow areas and from excavation taking place during contract performance. Zone 1, comprising the least pervious section of the dam, was to consist of a mixture of selected clay,

silt, sand and gravel, compacted by tamping rollers to 6-inch layers. Zone 2, which was more pervious, was to consist of selected sand, gravel and cobbles, or rock fragments compacted in 12-inch layers by crawler-type tractor. Zone 3, which was still more pervious, was to consist of miscellaneous clay, silt, and gravel, and cobbles, or rock fragments compacted in 12-inch layers by pneumatic-tired roller. Riprap was to protect the upstream slope of the dam embankment above elevation 5,910.

The spillway was to consist of an approach channel, concrete crest structure, concrete bridge, concrete chute and concrete stilling basin. The outlet works provided for were to consist of a concrete intake structure, concrete-lined tunnel, access shaft and gate chamber for two high pressure gates, concrete shaft house, concrete stilling basin and an outlet channel. Construction of access roads and of earthwork and culverts for roads to be relocated and of a concrete slab boat ramp constitute the roadwork portion of the job.

The contract provided for unit prices for certain units of work, such as excavation, backfill, and concrete, the quantities of which were estimated, and lump-sum prices for performing certain specific items of work, such as water diversion during construction and clearing, and for furnishing and installing specific equipment such as gates. The contract included Standard Form 23-A, April 1961 edition.

¹ Paragraph 11 of the Special Conditions of the contract (Exhibit No. 1). Testimony was given at the hearing that Lost Creek is 63-65 miles from Ogden (1 Tr. 91). Exhibits referred to without designation as the appellant's or the Government's are contained in the appeal file. Exhibits bearing the prefix "B" were introduced by the Government, and start with number 300 (1 Tr. 36). By agreement of counsel there are no exhibits numbered between 273 and 299 (1 Tr. 36-37). Exhibits bearing the prefix "C" were introduced by the appellant. Exhibits bearing the prefix "X" are either joint exhibits or larger versions of drawings contained in the specifications. Transcript references relate to the volume and page of the transcript.

Out of that agreement arose this appeal, which the appellant has characterized as presenting:

* * * a case of first impression in that the applicable facts, both in their separate parts and in their cumulative effects, are of such magnitude and extent and interdependence as to be without parallel in precedent.²

The appeal involves the propriety of the Government's termination of the contract for default and a veritable congeries of claims amounting to over \$2,500,000.³ It is the Government's position that the appellant abandoned the work, but the appellant contends that it merely discontinued operations for justifiable reasons.

In its notice of appeal (Exhibit No. 218), the appellant charges that the Government (1) furnished inadequate and inaccurate plans and specifications, and erroneous and misleading topographic and geological data, (2) performed improper survey work, (3) failed to issue change orders properly and to

make progress payments, (4) was hypertechnical in its inspections, and (5) administered the contract improperly. However, despite the existence of individual claims that appear to be clearly cognizable under the terms of the contract, the appellant has contended throughout that this appeal is actually one "unitary claim for breach of contract."

The appellant's theory, as we understand it, is that the Government's entire course of conduct as outlined in its notice of appeal constituted what appellant calls an indivisible "cardinal breach" of the contract for which there is no adequate administrative remedy and concerning which only the Court of Claims can grant relief. It follows, in appellant's view, that even such matters as changes and changed condition claims, which are specifically provided for in the contract, are swallowed up and lose their identity when found in association with the traditional "breach." Put another way, appellant appears to be maintaining somewhat synergistically that the whole is not only inseparable from its parts but is also greater than the sum thereof.⁴

² Appellant Posthearing Brief, 458. The case is clearly precedential, at least as to this Board, in the duration of its hearing and magnitude of its record. The hearing ran a total of 83 days. It produced 9,506 pages of testimony and related colloquy, contained in 83 volumes of transcript. Over 700 exhibits, many of which are multi-paged and a number of which consist of compilations of hundreds of pages, were introduced into evidence by the parties. The appeal file exhibits number 250. The parties have filed prehearing and post-hearing briefs totaling in excess of 1,520 pages. See also, note 338 *infra*.

³ According to the appellant, its allocated claims amount to \$2,516,560 and its total project costs were \$2,640,974 (Appellant Exhibits (revised) C-225 and C-216).

⁴ At 460-61 of its Posthearing Brief, the appellant states:

"* * * [T]his case is more than the fragmentation of its potentially separable parts. The case must be viewed as the sum of its parts which comprise its entirety. The case is a mosaic of interrelated facts depicting the events which occurred only at Lost Creek. * * * [I]t was the interrelationship and cumulative effects of the totality of the occurrences at Lost Creek which brought about the demise of the Contractor."

Prior to the commencement of the hearing, the appellant moved for a declaration by the Board of the extent of its jurisdiction over this appeal in the light of the appellant's contention. Inasmuch as the Board found that a number of the disputes, including the propriety of the default termination, clearly involved questions of fact arising under the contract, which were neither insignificant as compared with claims for ostensible breach nor necessarily integrated into such claims, we declined to dismiss the appeal on the strength of the record then before us.⁵ We held that the Board cannot disregard the agreement of the parties contained in the Disputes clause which calls for it to hear and decide the obvious non-breach claims which are redressable within the four corners of the contract. However, we expressly recognized appellant's right to preservation of its theory.

We have reexamined the question from the vantage point of a full record. We find that there are certain factual threads which are central virtually to the entire appeal but that nothing was developed in the course of the hearing which warrants a reversal of our previous

view. The propriety of the default termination is undoubtedly a matter over which the Board has initial jurisdiction.⁶ Since resolution of this question turns on the justification for appellant's discontinuance of work, it raises as issues of fact the various acts of contract administration characterized as breaches by the appellant.

Based upon our review of the complete record, we have concluded that there are present numerous distinguishable claims clearly cognizable under the contract. For the reasons hereinafter appearing, we regard none of the alleged changes as cardinal charges. Perhaps under certain unusual circumstances the cumulative effect of changes, changed conditions and various other Government acts and non-acts may conceivably be considered a cardinal breach.⁷ A mere recasting of a dispute which has been made subject to adjustment under the contract into breach of contract language and theory does not remove the dispute from the administrative disposition required by the contract or from the remedies therein pro-

⁵ *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

⁶ *Steenberg Construction Company, IBCA-520-10-65 and IBCA-639-5-67* (November 2, 1967), 67-2 BCA par. 6672. In addition, the Board did not consolidate appellant's challenge to the excess cost determination (contained in the related appeal docketed as IBCA-639-5-67) with this appeal in view of the size of the record here.

⁷ Where a contractor has alleged that various changes, taken cumulatively, constitute a cardinal change, the Court of Claims has said (1) that the point at which a change is beyond the scope of the contract is a matter of degree varying from one contract to another and (2) that the number of changes is not of itself determinative. *J. D. Hedin Construction Co., Inc. v. United States*, 171 Ct. Cl. 70, 105-06 (1965).

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vided.⁸ It is not for this Board to disturb the deeply engrained distinction between what have come to be regarded as breach of contract claims and those redressable under the contract.⁹ The appellant has already commenced a related action in the United States Court of Claims,¹⁰ where the Court will doubtless have an opportunity to consider the point.

Accordingly, we adhere to our earlier opinion and reaffirm our conclusion that the Board has jurisdiction over this appeal, except as will be reflected *infra* in our treatment of certain specific claims.

The Factual Background

In view of the multiplicity of claims, the diversity of the subjects,

⁸ *Jefferson Construction Co. v. United States*, 183 Ct. Cl. 720, 725 (1968). The Court of Claims has recently said:

"Where all the claims were redressable before the administrative body by an award of an equitable adjustment, the redescription of the claim as one for breach of contract is a transparent and ineffectual device for escaping the administrative jurisdiction for the fresh forum of a judicial retrial of the issues." *Northbridge Electronics v. United States*, 195 Ct. Cl. 453 (1971).

⁹ See *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 419-20 (1966); *Morrison-Knudsen Company, Inc. v. United States*, 170 Ct. Cl. 757, 763 (1965), in which the Court said:

"In the broad sense, every failure by the Government to comply with its contractual obligation is a breach of contract * * *. In this context, a claim based on the inadequacy of an equitable adjustment would be a breach of contract. But we know that this is not so. * * *"; *Allison and Haney, Inc.*, IBCA-642-5-67 (February 7, 1968), 68-1 BCA par. 6842, n. 14.

¹⁰ *Steenberg Construction Company v. United States of America*, No. 229-67.

and the massiveness of the record, it is imperative to keep the entire appeal as a whole in some form of perspective. There are present certain factual highlights which taken together provide a somewhat coherent background to the myriad of individual allegations by both parties. The first of these relates to the Government's surveying practices both prior to and after construction had commenced. According to the appellant, the Government committed various errors of omission and commission in surveying relating to both the layout of the work and measurement of quantities. The appellant maintains that the "principal effect" of these errors and omissions in survey data was to cause it to perform extra work and "also to perform most of the work in a different sequence and under different conditions than those specified" (Appellant Prehearing Brief, 17). Aspects of the work particularly so involved were dam embankment excavation, open cut excavation, borrow areas, and roadway right-of-way. The various claims that arose from the surveying are discussed *infra*.

In addition, the contractor contends that the Government's pre-construction planning and design of the project are causally related to many of the problems which the appellant encountered during construction. The appellant alleges that the Government rushed both the process of collecting the data re-

quired preliminary to the design of the dam and the design effort itself, resulting in serious internal errors.

The appellant has traced the Bureau's activities at Lost Creek back to 1947, when the Bureau commenced the reconnaissance or preliminary design of a dam. This stage culminated in a preliminary design in 1951. Thereafter, in 1958, the next stage in the planning and design of the dam was achieved with the preparation of a feasibility design drawing and estimate (Appellant Exhibit C-34).

Under the projected budget control schedule for the Weber Basin Project, award of the contract was set from time to time as April 1962, January 1963, and May 1964 (Exhibits B-300, C-67). The appellant claims that the ultimate award of the contract in June 1963, instead of May 1964, constituted an inordinate acceleration of the project. In its view the advancement in making the award was precipitated by pressure from potential consumers of water to be stored at the dam. However, according to Clinton D. Woods, who served first as project manager for the project and then as contracting officer's representative, the speed up with respect to the dam occurred because the construction of other project facilities was found to be unnecessary (8 Tr. 807-08).

Whatever the reason, the appellant maintains that the acceleration of the construction schedule created a "survey crisis for the Bureau at Lost Creek" (Appellant Posthearing Brief, 25). The Bureau issued

its Notice to Proceed to the appellant on July 17, 1963, which was also the date on which the Government acquired possession by eminent domain of certain land required for the project. In appellant's view, the absence of a headstart or lead time in surveying by the Government led to inaccurate and incomplete Government measurements, in order to stay ahead of the appellant.

The major complaint in this regard is that the series of benchmarks established during the preconstruction survey of the site were based upon an existing triangulation network which had not been checked out as to their internal relationship before the construction surveys occurred, but were nonetheless used for both horizontal and vertical control, contrary to good practice. The appellant also contends that the Government further contributed to the survey errors by failing to employ an adequate surveying staff.

A second thread running through this case is the contention that the Government's subsurface exploration data were "seriously inadequate and misleading" (Appellant Prehearing Brief, 23). Major segments of the work allegedly affected thereby were the cutoff trench, shaft area, tunnel, spillway, open cut, and borrow areas, all of which are discussed *infra*.

Related to this contention is the question of the contractor's prebidding investigation and bid. The Invitation for Bids is dated April 16,

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1963 (Government Exhibit B-409). Prior to submission of Steenberg's bid, Emil E. Walsh, its vice president, and Thomas Miller, who was its first superintendent at Lost Creek, toured the site on May 16, 1963, in the company of the Bureau's Fred Lasko.¹¹ Mr. Lasko was principal engineering assistant to the Resident Engineer and specifically in charge of survey and inspection (1 Tr. 96; 9 Tr. 980-81).

According to Mr. Lasko, the tour commenced around noon and ended at about 5:30 p.m.¹² They traveled in a Bureau automobile (9 Tr. 982), stopping from time to time at approximate locations of various aspects of the job. At the first stop Mr. Lasko pointed out the "approximate location of the stilling basin and in general the alignment which the spillway would take" (9 Tr. 983).

The party then proceeded up the road "to a position which is approximately on the axis of the dam" where Mr. Lasko showed "the approximate location * * * of the center line of the dam and the approximate height of the ground which the dam would be built to" (9 Tr. 983). From there they drove to the site of the inlet portal of the tunnel, where Mr. Lasko pointed out the approximate location of the inlet (9 Tr. 984).

The party next viewed the ap-

proximate limits of Borrow Area No. 4 and then they proceeded to a point where the boat ramp and the boat ramp parking area were to be located. They also observed the proposed position of the relocated road and the rock quarry which was to be used as the source for riprap, on the edge of Borrow Area No. 1. At the request of Messrs. Walsh and Miller, Mr. Lasko pointed out the location of the aggregate source for concrete and indicated it was described as Borrow Area No. 5 (9 Tr. 987).

On the day following the tour conducted by Mr. Lasko, Messrs. Miller and Walsh examined at the Bureau office in Ogden samples and cores recovered in subsurface investigations. Certain cores were unboxed and were open for inspection. At one point Mr. Miller testified that Bureau representatives offered to open those that were boxed (21 Tr. 2402), but this is in dispute (43 Tr. 4870). Subsequently, Messrs. Miller and Walsh made a number of additional visits to the damsite (13 Tr. 1401-02). According to Mr. Miller they visited the site three or four times prior to bidding (13 Tr. 1402).

At a conference immediately after the bids were opened on June 4, 1963, Mr. Woods implied that the appellant may have made a mistake in its bid (7 Tr. 682). The estimate prepared by the Bureau was \$2,794,732 (Government Exhibit B-629), or approximately \$741,000

¹¹ 13 Tr. 1393-94; 70 Tr. 7746; Appellant Exhibit C-240, p. 137.

¹² 70 Tr. 7747, 7746. Mr. Miller testified that his recollection of the tour approximated Mr. Lasko's description (13 Tr. 1394).

more than Steenberg's bid of \$2,053,000.07.¹³

Thereafter, on June 6, 1963, Messrs. Miller and Walsh conferred with the contracting officer at his office and advised him that they "had rechecked their bid" and could "find no reason for concern" (65 Tr. 7191). However, on June 12, 1963, the contracting officer called for confirmation of the bid prices on certain items of work (Appellant Exhibit C-59; 43 Tr. 4835).

According to Mr. Walsh, he was not concerned about appellant's bid on those items because appellant had already had them "sublet out at our price [or] less." (43 Tr. 4836) Mr. Richard Steenberg, the president of the company, was concerned, though, and at his behest Mr. Walsh requested the contracting officer to allow a consultant to review the bids

(43 Tr. 4836; 65 Tr. 7191). The contracting officer, however, suggested that the contractor seek legal counsel (65 Tr. 7192) and refused to allow appellant time to have a check made (43 Tr. 4836). On June 17, 1963, the contracting officer received a telegram (Appellant Exhibit C-60) from Mr. Steenberg which apparently concluded the matter, stating as follows:

Bids on Lost Creek Dam appear to be satisfactory although rather tight. Certain concrete items appear to be low due to insufficient time to distribute overhead and profit equally over all items.

The Notice to Proceed was received by the appellant on July 22, 1963 (2 Tr. 115). Under Paragraph 15 of the Special Conditions of the contract, the work was to be completed within 800 calendar days thereafter, or on September 29, 1965.

¹³ The bid of Morrison-Knudsen Company, the second lowest bidder, was \$2,856,105. Comparison of the Steenberg bid with the Bureau's estimate and the average of ten other bids, reveals the following (Exhibit No. 220, p. 1):

Bid item	Bureau estimate	Average of 10 other bids	Steenberg bid
4. Excavation for dam embankment foundation (cubic yard)-----	\$1. 40	\$1. 41	\$0. 24
11. Excavation in borrow areas (cubic yard)---	. 40	. 53	. 22
28. Sand for grouting foundations (cubic yard)---	12. 00	40. 05	2. 24
58. Furnishing and installing reservoir level gage, well, piping and equipment (lump sum)-----	6, 750. 00	4, 805. 00	1, 679. 00
64. Excavation for roadway (cubic yard)-----	. 80	. 81	. 15

Examination of a three-page listing (Appendix A) of its major construction projects (Appendix A) contained in its Prehearing Brief indicates that the appellant, which is based in St. Paul, Minnesota, is primarily engaged in the construction of schools, hospitals, auditoriums, commercial buildings, military installations, and similar projects mainly in the Great Lakes region. There is no showing that it had previously performed any work in the Rocky Mountain area or that it had ever undertaken to construct a dam before.

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The contractor began clearing and stripping operations for the dam on July 22, and July 26, respectively. Roadway excavation was also commenced on July 26. In the meantime, the Government proceeded with its staking out work, as required by Paragraph 20 of the contract, the pertinent provision of which reads:

20. Staking Out Work

a. Lines and grades.—The contracting officer will establish benchmarks and lines and grades at each portal of the tunnel. The contractor shall perform all other surveys and layout work within the tunnel and shaft.

The contracting officer will establish all other lines and grades required for proper execution of the remainder of the work. * * *

On July 29, 1963, the Government commenced the work of staking for the cutoff, or core trench, the purpose of which is to prevent the seepage of water from the dam. At Lost Creek this was to be accomplished through the construction of an impervious shield or membrane from the top of the dam down and into solid impermeable bedrock (8 Tr. 863; 51 Tr. 5626). This required excavating at the appropriate place and refilling the area excavated with clay (Zone 1) material. The depth of the trench was intended to be approximately sixty feet, according to the Government (Appellant Exhibit C-20).

However, the Government staked the cutoff trench to a depth of approximately 28 feet. This occurred

because the surveying party relied solely on the depth of the rock shown in Drill Hole 23, which was at elevation 5,802 feet (Appellant Exhibit C-77).

The appellant thereupon completed excavation of the trench to an average depth of 28 feet on August 30, 1963 (Appellant Exhibit C-62). When bedrock was not encountered at that elevation, the trench was restaked on September 3, 1963, 14 feet deeper, to elevation 5,788 feet. As a result, the appellant was required to return its men and equipment to the area for continued excavation. However, on reaching this depth the contractor once again found no rock. Excavation thereupon continued, without further staking, until rock was encountered approximately 13 feet below the second staking at elevation 5,775 feet, on October 9, 1963 (Appellant Exhibit C-8, p. 7).

As a consequence "of the extra work, extra time and extra expense" resulting from the additional excavation required for the cutoff trench appellant filed a notice of claim, dated November 8, 1963.¹⁴ The claim was grounded upon the Changes and Changed Conditions clauses of the General Provisions and Paragraph 51 of the Special Conditions (Open-cut Excavation, General) of the contract.

It is the appellant's contention

¹⁴ Exhibit No. 10. The letter was a follow-up of appellant's telegram dated October 4, 1963 (Exhibit No. 9). The monetary amount of the claim was left for future determination.

that the Government's mis-staking delayed every part of its work that was to follow the cutoff trench excavation and made all of such work more expensive (Appellant Posthearing Brief, 47). Although the Government denies that all of the claimed ramifications were causally related,¹⁵ the parties both agree that the difficulties that arose in connection with the cutoff trench constitute "the predominating element" of this appeal.

Nearly all of the appellant's claims arose out of activities which occurred during the period between receipt of the notice to proceed and the time that the appellant shut down construction operations in the beginning of the winter of 1964-65. Most of these claims were raised initially during a few months' time, commencing in August, 1964, when the appellant and Government exchanged considerable correspondence, although the events giving rise to the bulk of them occurred several months previously.¹⁶

¹⁵ Government Posthearing Brief, 61; Appellant Posthearing Brief, 46.

¹⁶ See, e.g., the letter of appellant's attorneys, dated October 16, 1964 (Exhibit No. 92), to the contracting officer, stating, *inter alia*, in connection with a meeting held on April 22, 1964:

"I do recall that you invited me to open my brief case and tell you about our claims but you should recall that I told you that I considered it premature to do so at that time. * * * We realize that we must prove our claims but by the very nature of this work and the way in which changes have occurred, instant proof is not obtainable. We have been advising you of these claims as they come to our attention but in many, if not most instances, determination of increased costs and extra time requirements must abide the completion of the work."

The contracting officer deferred action until April 1965 on the cutoff trench claim and other claims that were filed subsequent thereto, on the ground that the appellant had failed to furnish details and supporting data. By telegram dated April 9, 1965 (Exhibit No. 150), he notified appellant that in the absence of such data his determinations would be based solely on pertinent Government information. The contractor thereupon denied that it had failed to furnish the data and requested the contracting officer to issue "an interim decision" only (Exhibit No. 154).

Four unilateral Change Orders numbered 1 through 4, were subsequently promulgated in tentative form, pending appellant's submission of additional information. Under Change Order No. 1, dated April 16, 1965 (Exhibit No. 2), the appellant was allowed an extension of time of 127 calendar days beyond the original completion date of September 29, 1965, including a period to correspond to the duration of the 1965-66 winter shutdown, to July 4, 1966. The change order also provided for a lump-sum increase in the contract price of \$147,830.27 as compensation for appellant's extra costs due to the Government's incorrect staking of the core trench.

Under Change Order No. 2, dated April 23, 1965 (Exhibit No. 3), the contract price was increased by \$1,411.82, and the contract completion time was extended by ten cal-

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endar days, to cover the extra work involved in constructing the upper portion of the access shaft. Change Order No. 3, dated May 21, 1965 (Exhibit No. 4), provided for an increase in the contract price of \$27,468.87 and an extension in contract completion time of twenty calendar days. It covered the extra work involved in constructing the parking and turnback areas for the boat ramp and extra work in the tunnel shaft, including chipping rock from the tunnel wall to permit installation of the reservoir level gage piping outside the reinforcing steel and waterstop, furnishing two sets of tunnel support steel, installing timber lagging in the tunnel, and bracing the grout pipe used in the solution caverns.

The contracting officer then advised that he was prepared to issue findings of fact on all claims not allowed in the change orders, unless the appellant submitted further information for his consideration.¹⁷ A meeting was thereupon held, at the appellant's request, on June 22, 1965, at which the contractor provided additional documentation for its cutoff trench claim and cost computation and the Government agreed to withhold action on claims and change orders pending further substantiation from the contractor.¹⁸

¹⁷ Telegram to contractor, dated May 18, 1965 (Exhibit No. 165).

¹⁸ Government's letter to appellant, dated June 24, 1965 (Exhibit No. 182), referring to appellant's letter, dated June 21, 1965 (Exhibit No. 178); appellant's attorneys' letter, dated June 23, 1965 (Exhibit No. 179).

By letter dated July 2, 1965 (Exhibit No. 186), the appellant advised that supporting data regarding its claims were being prepared but that the claims were "unitary" in nature and could not be "artificially segregated into separate work items."

On July 20, 1965, appellant supplied the Government with a list of equipment rental rates and related information (Exhibit No. 189). Thereafter, the appellant protested the Government's progress payment estimates for July and August¹⁹ and advised of its "intention to make claim for an equitable adjustment * * * in connection with [contract bid] Items Nos. 5, 6, and 38" (Exhibit No. 204). The appellant had previously protested the Government's alleged payment abuses on a number of occasions during 1964 and 1965.²⁰

The appellant, by letter dated September 13, 1965, also protested Change Order No. 4 (Exhibit No. 5), dated April 30, 1965, which it received September 7, 1965 (Exhibit No. 203). This change order related to the installation of wire mesh fencing, rock bolts, four cable anchors and supports on the excavation cut slope above the spill-

¹⁹ Appellant's letters, dated August 11, 1965 (Exhibit No. 197) and September 17, 1965 (Exhibit No. 204).

²⁰ See its letters dated October 13, 1964 (Contractor Supp. Exhibit 1); October 16, 1964 (Exhibit No. 93); November 17, 1964 (Exhibit No. 99A); November 20, 1964 (Contractor Supp. Exhibit 2); December 14, 1964 (Exhibit No. 105); February 12, 1965, through its attorney (Exhibit No. 132); and May 27, 1965 (Exhibit No. 173).

way for protecting the area below from loose rock above, all of which materials were furnished by the Government. It increased the contract amount by \$1,850.73 and extended the contract completion time by eight calendar days.

The appellant has alleged that Change Order No. 4 was "either held" up "for four months or * * * dated back to April 30" (Exhibit No. 203) "because the Bureau did not have funds to pay for the change."²¹ In its letter of September 13th, it specifically asserted "a claim for further adjustments beyond those granted by" the change order.

A few days later the appellant abruptly shifted from a discussion of details to a very broad course of action. By letter dated September 18, 1965 (Exhibit No. 206), the appellant notified the Government that it was discontinuing work under the contract "due to numerous breaches of contract * * * and because of wrongful withholding of funds * * *." The contracting officer urged the appellant to resume work, by telegram dated September 24, 1965 (Exhibit No. 211). After the appellant affirmed its position by telegram dated September 28, 1965 (Exhibit No. 212), the contracting officer later that day

telegraphed it a notice of termination of the contract for default pursuant to Clause 5 of the General Provisions (Exhibit No. 213).

The appellant filed a timely notice of appeal, dated October 21, 1965 (Exhibit No. 218), from the termination and the change orders. In March 1966, the Government submitted the appeal file, consisting at that time of 220 exhibits.

By order dated May 17, 1966, the Board determined that:

* * * findings sufficient for orderly consideration of [the] appeal * * * are lacking, except for those concerning the termination for default order * * * and those related to some of the rulings made in Order for Changes No. 1 through No. 4 * * *.

The contracting officer was directed to issue a findings of fact and decision relating to the four change orders and a second findings of fact concerning all other matters in dispute.

The findings of fact subsequently issued relating to the change orders (hereinafter referred to as Findings of Fact No. 1) is dated June 8, 1966 (Exhibit No. 221). It allowed appellant a net additional sum of \$7,368.78 and extended the contract completion time up to and including August 9, 1966.²² Thus, by virtue of

²¹ Appellant Posthearing Brief, 436-7, citing the contracting officer's testimony at 45 Tr. 5160, and the Government's teletype message, dated June 16, 1965 (Appellant Exhibit C-209). The Government asserts that the time that elapsed between the completion of the work directed and the issuance of Change Order No. 4 was due "solely to the time consumed in processing the order through the various Bureau offices." (Government Posthearing Brief, 527.)

²² The findings allowed the appellant the following additional amounts, (1) \$7,036.37 for Change Order No. 1; (2) \$60.06 for Change Order No. 2; and (3) \$274.77 for Change Order No. 3, and deducted \$2.42 from the amount previously allowed by Change Order No. 4. It reduced the extension of time granted under Change Order No. 1 by two days to July 2, 1966. It provided for additional time extensions as follows: (i) Change Order No. 2—ten days; (ii) Change Order No. 3—twenty days; and (iii) Change Order No. 4—eight days.

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the change orders and the findings the contract price was increased in the total amount of \$185,930.47.

The second findings of fact required by the Board's order is entitled "Findings of Fact No. 2" and is dated July 1, 1966.²³ It purports to cover all matters in dispute between the contractor and the Government with the exception of those included in the previous findings, the termination for default, and the "alleged 'cardinal breach' by the Government." It allowed the appellant the sum of \$2,661.56, disallowed the remainder of appellant's claims totaling \$2,159,048.57 and denied the claims for extensions of time.²⁴

The Board, by order dated September 11, 1968, required the issuance of a third findings of fact and decision (hereinafter referred to as Findings of Fact No. 3) which is dated October 22, 1968, with respect to the appellant's aggregate source (Borrow Area No. 5) claim.²⁵ The contracting officer therein found that no claim for changes or extra

work was presented and that the appellant was not entitled to any allowance because of alleged changed conditions, and consequently denied the claim. The appellant filed a separate Notice of Appeal from the decision, dated October 30, 1968. That appeal was merged *nunc pro tunc* with the earlier appeal bearing docket no. IBCA-520-10-65.

The chronology of the claims is most succinctly described in the words of appellant's attorney, as follows (5 Tr. 488-89):

The claim items * * * started with the core trench, the earliest claim filed. The next generally in sequence * * * was a claim for overbreak payment for removal of excess materials on the upstream inlet portal face. The next claim * * * started [was] an accumulation of claims for quantity computations in the dam embankment area and on the roadway, based upon claims of erroneous survey being used for measurement.

There was a claim on the roadway for changing alignment of the road, causing the contractor extra rock excavation and also mis-staking of the back slopes, causing extra rock excavation. And then there was an accumulation of other claims on the roadway relating to changes made as directed in the field pertaining to elevation errors and adding of culverts and providing increased fill over utility lines and that sort of thing.

Then there developed about this same time, because tunnel construction was proceeding at this time, claims pertaining to extra excavation and related problems of cleanup and removal of tights in the tunnel, the problems of mud slides in the tunnel, and claims of excessive inspection and hypertechnical

²³ Attached to the findings are additional appeal file exhibits numbered 222 through 250. Findings of Fact No. 2 is designated Exhibit No. 251.

²⁴ Appellant was allowed the sum of \$1,573.52 on its claim for riprap and \$1,088.04 on its sales tax claim (Exhibit No. 251, pars. 233, 238 and 247).

²⁵ At the hearing the Government took the position that the money damage aspect of the claim should be excluded. The Board, however, determined that additional findings were required and directed the contracting officer to ascertain if appellant was entitled to a monetary allowance for alleged changes, changed conditions or extra work in connection with the aggregate source (Borrow Area No. 5).

inspection and overstrict requirement on placing of steel.

There were disputes about the additional length required on radial sections, or circular sections, or reinforcing steel in the tunnel, as to what the required overlap was. There were complaints about harsh and unworkable concrete mixes that were specified for putting through the grout machine in the tunnel and later in the spillway and outlet work and in the intake structure. Related to that were claims of improper requirements for patching and a claim that some of the patching, if not all of it, was attributable to improper mixes.

There was a claim for—at this time also related to the tunnel and gate chamber for the access shaft, and then we had some on-going disputes about lack of current payment of sales tax increase in payment of quantities of steel and cement on the basis of invoices presented, and we had a continuing complaint about not getting timely change orders and not getting timely or accurate payment.

Appellant has estimated that the cutoff trench claim constitutes 48–50 percent of its total claim, the open cut excavation, 20–25 percent, the roadway, 10–15 percent, and the tunnel and shaft, 5–10 percent (Exhibit No. 147). The claims will be considered under the headings generally utilized by the parties which relate to the various aspects of the work.

CUTOFF TRENCH

Appellant's Interpretation of Trench Depth and Width

At the time of the bidding, according to the appellant, it determined the depth to bedrock from original ground by relying upon the

logs of the drill holes in the valley floor which are shown on Section A-A of Drawing No. 526-D-2753 (entitled "Logs of Exploration"). The Drill Holes are numbered 22 and 23.²⁶

The logs of Drill Holes 22 and 23 showed bedrock respectively at 27.8 and 28.4 feet below original ground (23 Tr. 2626, 2585).

Appellant's Plan of Operations

The contractor's planned core trench excavation and backfilling operation was based upon the core trench having a depth in the valley floor of 28 feet from original ground and a uniform bottom width of 30 feet (13 Tr. 1417–18). Appellant contends that at the time of bidding it had developed a plan of operations²⁷ for the excavation and backfill of the cutoff trench and related work, based upon a cutoff trench depth of 28 feet, and uniform bottom width of 30 feet, as allegedly indicated by the plans and specifications.²⁸ Both the core trench ex-

²⁶ The site locations of Drill Holes 22 and 23 and Section A-A are shown on Drawing No. 526-D-2752 (entitled "Location of Exploration and Surface Geology") (Exhibit X-4).

²⁷ Appellant's overall progress schedule is Appellant Exhibit C-99. Its planned sequence and method of operations in connection with the excavation and backfill of the cutoff trench and related work are shown on Exhibits X-10 through X-13.

²⁸ The contractor determined the 28-foot depth to bedrock by relying upon the logs of the drill holes in the valley floor (Drill Holes 22 and 23) shown on Section A-A in Drawing No. 526-D-2753. These holes showed bedrock respectively at 27.8 and 28.4 feet below original ground. 13 Tr. 1417–18; 23 Tr. 2585, 2626, 2628, 2630.

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cavation and stripping of the dam embankment area were included in Bid Item 4 ("Excavation for dam embankment foundation"), scheduled quantity 140,000 cubic yards. On July 30, 1963, it also submitted to the Government its plan for diversion and care of Lost Creek during construction and removal of water from the foundations, which was approved on August 28, 1963.²⁹

Appellant first planned to strip the dam foundation of material which was unsuitable for use therein while simultaneously diverting Lost Creek from its original location in the valley floor to a new location against the left abutment of the dam foundation (the northwest bank of the canyon adjacent to the bedding rock). This was to permit excavation of the southeast portion of the dam foundation. After the stream was diverted, and during excavation, appellant planned to dewater the Zone No. 1 area by placing wells in the foundation area on both sides of the excavated area beyond the slopes of the Zone 1 material to lower the water table sufficiently to permit excavation of the trench.

Upon completion of the trench excavation, appellant contemplated placing drainage tile against the slopes of the excavated trench to

enable a connecting pump to remove any seepage water during the backfilling operation and maintain the water table at the required level below the backfill. After the trench was backfilled with Zone 1 material (earthfill) the drains were to be grouted to make the foundation solid. The appellant planned to install the dewatering wells and commence excavation of the trench simultaneously, in order to perform the excavation in the dry.

Once the southeast portion of the embankment was constructed to approximately stream bed elevation, Lost Creek was again to be diverted temporarily, this time to the southeast side of the canyon near the bedding rock. The northwest portion of the embankment was then to be excavated.

Excavation was to be accomplished initially by having two LeTourneau LS-60 scrapers³⁰ enter the excavation area from the right abutment side, and then proceed to the left abutment side, exiting at either the upstream side or the downstream side for placement of the material on the foundation. After the excavation had reached a sufficient depth so that the scrapers could not exit directly on either side, it was planned that the scrapers would enter the trench through a road next to the right abutment,

²⁹ The plan and covering letter constitute Exhibit No. 6. The plan alone is Appellant Exhibit C-98. The Government's letter of approval is Exhibit No. 8.

³⁰ The appellant expected to perform the excavation entirely with the scrapers except for the use of a front-end loader and hand shovels in the cleanup (13 Tr. 1435).

travel through the trench exit at the left abutment up a ramp of in-place material, and place the material either upstream or downstream. Since appellant expected that most of the movement was to be upstream, the return road was planned for placement on the upstream side of the trench. Appellant anticipated that the majority of the cutoff trench excavation would be Zone 2 material (sand, gravel and cobble fill), most of which was to be placed in the upstream dam embankment.

The cutoff trench excavation was to be completed in the fall of 1963 (except for the exit ramp on the left abutment side which was also to hold the relocated stream in place), together with the excavation for the grout cap and completion of the concrete grout gap and pressure grouting in the bottom of the completed core trench excavation. Appellant then planned to backfill the excavated area to original ground with Zone 1 material also during the fall of 1963.

The initial Zone 1 backfill was to be provided by means of a downhill haul from Borrow Area No. 2, located downstream from the dam foundation. The second source was Borrow Area No. 4, which was located upstream from the trench along the left abutment and was, generally, a downhill haul too. The backfill operation was to be performed by scrapers using an ingress and egress cycle the reverse of that

planned for excavation. After it was completed, the appellant was either going to relocate the stream through the backfilled foundation, or leave it adjacent to the left abutment.

Temporary backfilling of the V-shaped area between the remaining unexcavated material and the backfill was to occur during the winter of 1963-64. In the Spring of 1964, re-excavation of the temporary backfill was to follow, together with completion of the excavation on the left abutment side. Use of bulldozers was contemplated for excavation in certain areas on the right and left abutments. After backfilling the trench to original ground the entire dam embankment area was to be made relatively level. No stockpiling or multiple handling of material was anticipated either in the trench excavation and backfill or in the excavation from borrow and transportation to the dam embankment.

Appellant's Operations

The appellant's progress schedule (Appellant Exhibit C-99) contemplated completion of Bid Item 4 (excavation for dam embankment foundation) in early September 1963. This was the approximate time when the excavation as originally staked was contemplated. Several days before completion of Item 4, work on Item 11 (excavation from borrow and transportation to dam embankment) was to commence. The drilling of grout holes was scheduled to commence

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on September 1, 1963, by the grouting subcontractor, Prepakt Concrete Company.

In accordance with the progress schedule, appellant's earthwork subcontractor, M & S Construction & Engineering Co., commenced stripping of the material in Borrow Area No. 2 downstream and irrigation of the Zone 1 material therein, while the cutoff trench was being excavated to 28 feet. Thereafter, and before completion of that excavation in August, M & S commenced placement on the upstream dam embankment of some Zone 2 material obtained from the trench excavation and from Borrow Area No. 2. M & S also commenced placement of the Zone 2 pad on the downstream dam embankment during this period.

At approximately the same time a dewatering system, consisting of sump excavations with pumps, was installed by M & S's subcontractor, John W. Stang Corporation. It was allegedly premised on a 28-foot cutoff trench.

Appellant maintains that prior to the restaking of the trench, the dewatering operation was effective and that excavation occurred by and large in the dry, as planned. It asserts that the dewatering program became obsolete only when the depth of the trench went below 28 feet (Appellant Posthearing Reply Brief, 28).

At the outset, however, some subsurface water was encountered im-

mediately below the stripping level and one of the scrapers became "bogged down in wet material" the first day excavation in the trench was attempted (63 Tr. 6980-81). According to Mr. Harold Wilcox, the Government's resident engineer, excavation at this stage was at best only relatively dry. M & S would "excavate in slices until the material got to wet to proceed further. Then they would wait until it dried out again."²¹

The general procedure followed by M & S during this period was to use "scrapers and push cats and * * * excavate as long as" it "could without the scraper and dozer becoming [mired] down in the wet material." When that occurred, M & S would "[d]eepen the unwatering sump a little more and wait for a little more material to drain out so [it] could excavate on down again" (63 Tr. 6981). This type of operation continued until approximately August 30, or shortly before the first restaking on September 3.

When bedrock was not encountered in the trench excavation at a depth of 42 feet and the Government directed appellant to continue excavating until bedrock was finally

²¹ 63 Tr. 6982-83. Examination of Government Exhibit B-337 (late August 1963) and Appellant Exhibit C-118 (early August 1963) shows water in the cutoff trench. By the time the excavation reached elevation 5802 level (28 feet) the sumps that were dug constituted such large holes that they are difficult to differentiate in size from the cutoff trench itself (Government Exhibit B-337 and Appellant Exhibit C-102).

reached at 60 feet, the appellant alleges its excavation operations were adversely affected in a number of ways. M & S encountered difficulty in performing the excavation beyond the initially staked lines. The scrapers could be used only to excavate the top portions of the widened and deepened excavation lines. As M & S attempted to cut off the banks to deepen the trench, the underlying gravel became unstable creating a condition unsafe for the scrapers.

It thus became necessary for M & S to rent a dragline to continue with the excavation. The dragline initially was placed at the top of the cutoff trench and was thereafter placed on a bench in the side of the excavated trench. The material excavated by the dragline was placed into the scrapers to be transported for placement on the dam foundation. However, as the trench deepened the dragline was unable to reach the centerline at the bottom of the trench and so it was not possible to excavate the balance of the trench in 1963 with the dragline alone. That operation therefore had to be abandoned, and M & S (and later the appellant) utilized a number of additional methods in excavating to bedrock.

First a dragline-scraper combination was used and then a scraper-dragline-truck operation. These methods eventually required the excavation of a ramp into the downstream side of the foundation to

provide access to the bottom of the excavation for trucks and other hauling equipment to be used in loading and subsequent removal of the material for placement in the dam embankment.

The change in method of operation from use of a dragline alone made it impossible for appellant to maintain the originally planned hauling cycle in terms of the amount of material which could be moved per hour. The new methods of excavation were not, according to the appellant, as efficient as what it had planned originally (13 Tr. 1480).

During this period the evidence indicates that dewatering was not an unqualified success, as mentioned *supra*. Photographs taken in September 1963, show substantial volumes of water in the bottom of the cutoff trench.³² Outlet pumps of 8-inch and 12-inch diameter were utilized in the trench in order to remove inflowing water.³³

On October 17, 1963, eight days after M & S had reached bedrock, the appellant took over the excavation operations in the cutoff trench from M & S. This included excavation in the area of the stream bypass on the left abutment and in the area around the haul road which had

³² Government Exhibits B-341, B-342 and B-343 (all taken September 17, 1963) and B-344 (taken September 25, 1963); Government Exhibit B-302 (1963 Daily Construction Reports, October 7, 1963), p. 43.

³³ Government Exhibit B-302 (October 21, 1963), p. 64; Appellant Exhibit C-245, pp. 154-55.

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been constructed on the right abutment. In addition, the side slopes then had to be cut to the necessary grade, inasmuch as the ultimate dimensions of the side slopes could not be determined and excavated until the final depth of the cutoff trench was known. The appellant continued the trench excavation and placement of the excavated material in the embankment.

According to the appellant, the embankment operation was also severely affected by the deepening and widening of the trench after the initial restaking on September 3.³⁴ The placement of material in dam embankment from borrow and the placement of the material from the deepened and widened cutoff trench (and material from the tunnel, the tunnel portals and spillway, excavation of which had also commenced in August) resulted in the dam embankment being progressively further out of level with the cutoff trench (13 Tr. 1482-83; 14 Tr. 1541-43; Exhibit X-15).

Transportation out of the cutoff trench allegedly became more difficult after the restaking because of the continuously higher climb required for the equipment to travel up the trench and the embank-

ment.³⁵ As the equipment ascended, the placing of the embankment became more difficult inasmuch as the operating area on top of the embankment on either side of the trench progressively diminished (14 Tr. 1543-46).

Grout Cap and Grouting

The deepening of the trench also affected the grouting operations, according to the appellant. The grouting items (Bid Items 20 through 29 and 33) were to be performed by Prepakt pursuant to a subcontract dated July 26, 1963 (Appellant Exhibit C-203-A). The object of grouting is to seal with a mixture of cement and sand, known as grout, all seams, joints and open cracks in the bedrock. This was to be done by injecting the grout under pressure through pipes placed in grout holes drilled by Prepakt, prior to placing Zone 1 backfill. Under the specifications a concrete grout cap (or wall) was to be placed in an excavated grout cap trench in the bedrock in the bottom of the cutoff trench. The purpose of putting the grout cap into the foundation is to hold the grout pipes that are inserted there through which the grout is pumped and thus facilitate the grouting (53 Tr. 5925). It also cuts off seepage in the upper portion of the bedrock which cannot be suc-

³⁴ E.g., Mr. Wilcox's daily construction report for October 21, 1963 (Government Exhibit B-302), states: "Three dozers are pushing material to the chute in Borrow Area No. 2; three are hauling to zone 3 of the dam. Material being excavated is fairly good zone 1 material, but there is no place ready in the dam to put it."

³⁵ It was estimated that dam embankment upstream and downstream had reached approximately 40 feet in height above original ground before the end of the 1963 construction season (14 Tr. 1543).

cessfully grouted. Under the progress schedule, actual drilling of grout holes was scheduled to commence on September 1, 1963.³⁶

However, the deepening of the trench resulted in the grout cap (including both the excavation and the concrete cap itself—Bid Items 5, 6 and 38), being greater in length and in depth than would have been the case if the trench had been 28-feet deep. Appellant alleges that this caused "a major change in the entire grout cap operation to a more difficult series of excavation and concrete backfill operations as areas of bedrock appeared and became accessible" (Appellant Posthearing Brief, 111-12). The appellant placed a 3-foot culvert across the core trench along the left abutment to divert the stream and permit grout-cap excavation and pouring of concrete to be completed behind the pipe.

While its progress schedule contemplated shutting down for the winter on November 15, 1963, appellant alleges it elected to continue in hopes of completing the cutoff trench excavation, grout cap, grouting and backfill during the winter.³⁷

³⁶ Appellant Exhibit C-99. Appellant planned to divert Lost Creek to the east (left) side of the canyon and, while it was diverted, to excavate, drill, grout and fill with the impervious material a portion of the cutoff trench on the west side of the canyon sufficient in size to permit redirection of Lost Creek to the west side of the canyon prior to onset of 1963-64 weather.

³⁷ Appellant Posthearing Brief, 109, citing Mr. Miller's testimony (13 Tr. 1487). We note, however, that counsel stipulated at the hearing that it was not possible for the appellant to have completed the cutoff trench excavation and refill in the winter of 1963-64 (66 Tr. 7288-93).

Although Prepakt did not actually begin drilling the first grout hole in the dam foundation until November 21, 1963, the appellant continued placing the grout cap while Prepakt prepared to perform the grouting. However, performance of the grouting and backfilling became impossible, according to the appellant, for several reasons.

At about this time there occurred a number of instances of alleged Government harassment. The Bureau inspector stopped appellant, as it prepared to make a concrete pour in late November or early December during the grout cap excavation on the left abutment. Ostensibly to prevent possible contamination which might cause unsoundness or decreased strength or durability, the Government wanted appellant not only to polish the aggregate scales (which appellant had polished), but, also the points on the cement scales at the batch plant (14 Tr. 1519-20).

And when Steenberg sought to pour the concrete grout cap in the bottom portion of the cutoff trench, at approximately Station 6 + 25, the Government refused permission therefor on the ground that water was percolating through the seams in the limestone bedrock. Work was delayed a week while appellant and the Government attempted to devise a method by which appellant could proceed with placing of the concrete. The method finally utilized, according to Mr. Miller, was:

* * * to commence pouring the concrete right into the water and actually let the hole flood full of water so there

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would be no running water and then just pour the concrete in the water and displace the water with the concrete. (14 Tr. 1528).

Prior to grouting the Bureau also allegedly required unnecessarily frequent cleanup of gravel which rather persistently was sloughed off from the steepening sides of the cutoff trench into the bottom (14 Tr. 1529-30). This is said to have been insisted upon by the Government in order to observe if any grout leakage was recurring. Appellant objected to the degree of cleanliness required (22 Tr. 2437).

Finally, on December 13, 1963, Prepakt refused to perform any further grouting work and shut down its operations. Mr. Walsh testified that the reason Prepakt gave appellant for leaving the job was the "delay caused by the deepening of the core trench and the delay getting into cold weather due to that effect" (43 Tr. 4844). The Government, however, maintains that the difficulties between Steenberg and Prepakt came about because the subcontract (Appellant Exhibit C-203-A) lacked an agreed performance schedule and also because of the appellant's failure to dewater the trench properly.³⁸ In any event, grouting came to a standstill.

³⁸ In subsequent litigation commenced by Prepakt against the contractor in United States District Court for the District of Utah, Prepakt was awarded a judgment of \$22,500 (Appellant Exhibit C-64). The judgment was affirmed by the Court of Appeals for the Tenth Circuit on the ground that the original progress schedule was binding upon the contractor (Appellant Exhibit C-65).

Cessation of Operations by M & S and Rental of Additional Equipment

M & S had discontinued its excavation operation in the cutoff trench on October 17, 1963, but had continued with excavation out of borrow and transportation to dam embankment. Its dewatering subcontractor, Stang, defaulted on its subcontract, as will hereinafter appear. On November 7, 1963, M & S ceased operations completely (Appellant Exhibit C-62, p. 2).

Appellant's explanation for this development, as stated at p. 31 of its Prehearing Brief, is that:

The large volume of extra material removed from the cutoff trench (which greatly increased costs), coupled with the Bureau's failure and refusal to make a timely equitable adjustment and payment for this costly extra work, plus the Bureau's failure to pay for a large amount of other cutoff trench work completed but not measured for payment, completely exhausted the working capital and credit of * * * M & S.³⁹

The Government, however, asserts that M & S's default was precipitated by the Stang default (Government Posthearing Brief, 115).

As a consequence the appellant undertook to perform what remained of the work that it had subcontracted to M & S. However, it did not have on the job the essential equipment to continue the work (13

³⁹ According to Mr. Miller, M & S was obligated to make payments for its equipment, repay a loan it had obtained to carry on the job, and cover its large payroll. With the increase in work and delay in completion, M & S did not receive the compensation it anticipated when required (13 Tr. 1481-82).

Tr. 1483), which was needed on short notice. Since it had subcontracted the major excavation and embankment operation, the appellant also had not anticipated any significant equipment use costs (69 Tr. 7639). Accordingly, Steenberg Construction Co., a partnership, purchased the earthwork equipment appellant required and rented it to the appellant.⁴⁰

Dewatering

Paragraph 47 of the specifications provides for the diversion and care of the stream during construction and removal of water from the foundations. Subparagraph a. thereof reads, in pertinent part:

The contractor shall construct and maintain all necessary cofferdams, channels, flumes, drains, sumps and/or other temporary diversion and protective works; shall furnish all materials required therefor; shall furnish, install, maintain, and operate all necessary pumping and other equipment for removal of water from the various parts of the work and for maintaining the foundations and other parts of the work free from water as required for constructing each part of the work. * * *

Subparagraph b. requires the contractor's plan for "the diversion and care of the river during construc-

tion" to be subject to the approval of the Government. Subparagraph c. governs the removal of water from the foundations as follows:

The contractor's method of removal of water from foundation excavations shall be subject to the approval of the contracting officer. Where excavation for cutoff trench in embankment foundations extends below the water table in common material, the portion below the water table shall be dewatered in advance of excavation. The dewatering shall be accomplished in a manner that will prevent loss of fines from the foundation, will maintain stability of the excavated slopes and bottom of the cutoff trench, and will result in all construction operations being performed in the dry. The use of a sufficient number of properly screened wells or other equivalent methods will be approved for dewatering. The contractor will also be required to control seepage along the bottom of the cutoff trench, which may require supplementing the approved dewatering systems by pipe drains leading to sumps from which the water shall be pumped. * * *

Appellant's water diversion plan (Exhibit No. 6) provides:

I. An initial relocation of Lost Creek will be made to the North West bank of the canyon adjacent to the bedding rock. This will be temporary diversion to permit excavation of the South East portion of the dam foundation. During the excavation of this area sufficient wells will be sunk to dewater the zone #1 area at a flow velocity of such low magnitude that no appreciable fines will be drawn from the surrounding area. It is anticipated that a maximum of four wells will be required. This however is an estimate and will be altered to suit conditions encountered. The above mentioned wells will be sunk on both sides of the excavated area beyond the slopes of the zone #1 material.

II. It is anticipated that it will be necessary to install drainage pipes on

⁴⁰ The partnership agreement is dated March 15, 1963, although the partnership's financial history dates back to 1953 (Appellant Exhibit C-283). The acquisition was financed through the First National Bank of St. Paul, which became chattel mortgagee thereof (49 Tr. 5466-67). The equipment rental agreement is Appellant Exhibit C-231. The equipment included "more powerful scrapers" in order to negotiate the steep grades into and out of the cutoff trench (38 Tr. 4192). The partnership and equipment rental agreements are more fully discussed *infra*.

each side of the bottom of zone #1 excavation. The drainage pipe if installed will either be cut into the rock outside the grout cap and backfilled with pervious material or will be coffered in and backfilled with pervious material as is indicated when this point of excavation is reached. These drainage pipes and this pervious material would be constructed in such a manner as to permit grouting when the embankment had reached an elevation sufficiently high to permit this being done.

III. The South East portion of the embankment shall be constructed to approximately stream bed elevation then Lost Creek will be again diverted temporarily this time to the South East side of the canyon near but not adjacent to the bedding rock. Impervious lining will be placed along the bottom and sides of this diversion channel through areas of the dam containing pervious material. This impervious material will be removed as necessary when final diversion is made through the diversion tunnel.

IV. The North West portion of the embankment will be excavated. The impervious core [*sic*] then be constructed to an elevation somewhat higher than the present stream bed. This embankment will be constructed according to the permissible [*sic*] slopes as specified.

V. Diversion of Loss [*sic*] Creek through the diversion tunnel is expected to be made in approximately July of 1964 at [*sic*] this time a shallow cofferdam will be constructed across the channel and beyond its banks to an elevation sufficient to maintain diversion through the tunnel. Clearing operations will have all been completed therefore, no excessive debris [*sic*] is anticipated. Periodic cleaning of the trashrack will be done as required to maintain a normal flow through the tunnel. It is anticipated that a shallow dike will need to be constructed in the vicinity of the Francis Creek Bridge to forestall inundation of the Lost Creek Road temporarily being used by the public.

VI. It is intended that prior to the run-off in May or June of 1965 the dam embankment will be completed to its maximum

elevation and the 1965 Spring run-off will therefore require no control other than the normal backup in the event the flow exceeds the capacity of the tunnel.

VIII. It is not anticipated that flash floods will be encountered in this area, however, should they occur the water will be permitted to pass over the dam embankment and any damage done by this passage will be properly repaired.

The appellant contends that its dewatering plan was rendered ineffective when it was obliged to excavate in lower elevations (Appellant Posthearing Brief, 108). For example, on October 7, 1963, two days before bedrock was struck, a large stream of water was reported by Mr. Wilcox as flowing continuously into the bottom of the cutoff trench at the easterly end (Government Exhibit B-302, p. 43). Thereafter, the appellant utilized outlet pumps of 8-inch and 12-inch diameter in order to remove the inflowing water.⁴¹

However, by November 8, 1963, a large quantity of water was flowing into the bottom of the trench, making it difficult to excavate for grout cap with hand shovels (Government Exhibit B-302, p. 87). And so, on November 12 and 13, 1963, J. S. Lee & Sons, a drilling company hired by appellant, installed 16-inch and 12-inch diameter wells with steel casing upstream and downstream. These wells were intended to intercept the water seeping in (Government Exhibit B-302). Throughout the winter of

⁴¹ Appellant Exhibit C-245, pp. 154-55; Government Exhibit B-302 (October 21, 1963), p. 64.

1963-64, from December 1963 through February 1964, the appellant operated pumps in the wells and in the cutoff trench. All of this resulted in additional expense and delay, according to the contractor (Appellant Prehearing Brief, 33).

1964 Operations in the Cutoff Trench

Undertaking to describe 1964 operations appellant's counsel asserts (Posthearing Brief, 121):

[R]esumption of the core trench excavation and foundation preparation were prevented by the action of water causing substantial sloughing of material into the core trench; second, the spring runoff caused the core trench to become and remain flooded for a substantial period; third, after again pumping the core trench, the Contractor was required to re-excavate the core trench and perform substantial cleanup to remove the material which had sloughed and washed into it; fourth, it was not until September 1964 that the cleanup and foundation preparation could be completed so as to permit placement of any Zone 1 material in the core trench.

All of these developments are characterized by the contractor as "adverse effects" attributable to the Government.

As we have seen, between December 1963 through February 1964, the appellant operated pumps from the deep wells and from the bottom of the core trench. On February 27, with the advent of Mr. Lyle Doak as superintendent, it changed its methods and elected to pump clean water from the creek into the trench (Appellant Exhibit C-62, p. 3). This was done in an effort to minimize the erosion which was then oc-

curing as a result of the movement of water into the trench (Government Exhibit B-354). The Government did not object to this procedure (34 Tr. 3785-86).

Appellant's dewatering problems, already serious because of seepage, increased as excavation deepened, and then reached monumental proportions with the spring runoff in 1964. The appellant's stream diversion plan had been designed for the more shallow depth and also for diversion during the summer and fall of 1963. The delay allegedly caused by excavation to a greater depth brought the excavation and grouting operations into the spring.

The diversion plan employed by the appellant consisted of a trash-rack at the upstream end of a channel dug through the left side of the site (Government Exhibit B-366). The appellant had an operating road in the center of the channel. In order to maintain the road there, on March 19 and April 2, 1964, prior to the spring runoff, the contractor removed the original bypass culvert on the left abutment and installed five larger culvert pipes for diversion of the spring runoff on the rock face of the east abutment. Three of them were placed under the road.

Hydrographs of Lost Creek were incorporated into the specifications (Drawings 526-D-2764 and 526-D-2747), so that a contractor could schedule his operations and prepare his diversionary scheme in the light of the data. They show momentary peaks of up to 730 cubic feet per

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second. However, the U.S. Geological Survey stream-gauge records for Lost Creek near the damsite (Government Exhibit B-475) indicate that the highest momentary peak of flow during the spring and summer of 1964 occurred on May 15, 1964, and amounted to 215 cubic feet per second, which is substantially below the peak range shown in the drawings.

It developed, nevertheless, that the culverts were unable to handle the water from Lost Creek. According to the appellant, the culverts were satisfactory for normal runoff but not for spring runoff. The Government contends that the diversion scheme did not "work because the contractor failed to remove the covers from the downstream ends of the upper two culverts" (Government Posthearing Brief, 119). On May 13, 1964, at the peak of the spring runoff the water exceeded the capacity of the culverts, overtopped the banks of the channel, and flowed into the cutoff trench which was already full of water.⁴²

As a result, considerable material was washed by the stream into the cutoff trench, all of which had to be removed. It was estimated that the material which had sloughed and washed into the trench after December 1963, reached approximately 20 feet in depth above the bedrock in the bottom of the trench (34 Tr. 3793-94; 38 Tr. 4277).

⁴² 34 Tr. 3789; Appellant Exhibit C-62, p. 3; Government Exhibit B-303 (May 14, 1964), p. 218.

The appellant commenced dewatering operations by means of a 6-inch centrifugal pump which expelled the water into the stream, on or about June 10, 1964. Pumping operations were impeded by mud and fish which clogged the pump. After several weeks of continuous pumping, the water level was lowered to a point where appellant could begin reexcavation in the trench. Renewed excavation of the accumulated and wet material was under the supervision of Mr. Harold Angel, who became earthwork superintendent in March 1964.

The appellant utilized a front-end loader to clean up the mud on that part of the ramp which had been excavated in 1963 near the left abutment on the downstream side. The material that was removed in this fashion was placed upstream from the Zone 3 material on the dam foundation. The equipment was required to enter the ramp going forward and then exit in reverse after loading. It was necessary to employ a bulldozer as auxiliary power in order to pull the front-end loader back out of the ramp. After the ramp cleanup was completed, appellant proceeded to build a roadway on the ramp out of rock from open cut.

The appellant then commenced reexcavation of the cutoff trench by means of a dragline which was used to load the reexcavated material into an end dump. In view of the slipperiness of the ramp, it was necessary to utilize a TS-24 scraper with the ad-

dition of a D-8 bulldozer in order to ascend the ramp with the reexcavated material.

When the reexcavation had proceeded to a point where a piece of equipment could get into the bottom of the trench, a 933 Caterpillar loader was placed there. In the area toward the right abutment the loader was used to push the material toward the dragline for removal. Some of the material was placed on top of the Zone 3 embankment downstream. Most of the material was hauled up over the existing Zone 3 embankment downstream and wasted or stockpiled.

While reexcavation was taking place, the appellant continued the pumping operations. The appellant also resumed work on the grout cap excavation and concrete placement preparatory to grouting. Appellant found after excavating that "rock had sloughed off around the grout cap and left the grout cap sticking up in the air ***." As a consequence, not having the required depth for the grout cap for grouting, appellant "had to take some of it out and reexcavate and pour new grout cap in the bottom of the trench." (34 Tr. 3795-96)

As for the grouting itself, Prepakt never returned to the job and appellant was obliged to obtain a new grouting subcontractor, Continental Drilling Company, by subcontract entered into June 10, 1964. Continental commenced grouting operations in the foundation on July 28, 1964. Apparently the work was done according to plan. However, appellant is seeking to be compen-

sated for changes in unit price costs to it and its obligations, as compared to those in the Prepakt subcontract.

Cleanup

The next area of controversy that arose in connection with the cutoff trench relates to final cleanup of the trench following excavation. To perform the cleanup, appellant had placed french drains consisting of perforated drain tile positioned in excavated trenches with crushed rock over the drains. On the upstream side of the trench bottom appellant placed two 18-inch housing culverts for pumps, and on the downstream side one culvert.

The controversy occurred when the Bureau imposed allegedly "impossible requirements" in completion of the cleanup. Mr. Earl Christensen, who succeeded Mr. Woods as the Government's project manager, is said to have insisted that the shale on the north side of the grout cap must be dry and as clean as the limestone bedrock at the east end of the trench before allowing the clay to be placed on it. It is the appellant's position that as soon as the shale is hit with the air nozzle, during the cleaning process, it breaks into small pieces and if dry, leaves the surface looking very dusty and that if water is used on it, it turns to muddy clay.⁴³ The Government contends, however, that the cleanup it re-

⁴³ Appellant Posthearing Brief, 129, quotes a diary entry of Mr. Wilcox, dated September 5, 1964 (Appellant Exhibit C-246, p. 677), purporting to indicate that Mr. Wilcox disagreed with Mr. Christensen regarding the scope of the cleanup.

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quired merely complied with Paragraph 63 of the specifications and did not constitute harassment of the contractor.

Backfill of the Cutoff Trench

On September 5, 1964, approximately one year later than originally planned, the cutoff trench excavation was completed and the appellant was ready to backfill the cutoff trench with Zone 1 material, which is intended to serve as an impervious barrier and is known as the core of a dam. Inasmuch as the Zone 1 material must withstand the water pressures, compaction by means of the sheepsfoot roller, the tamping roller, is prescribed to insure a "bonded homogeneous, impervious fill" (53 Tr. 5752).

Backfilling of the trench allegedly presented the appellant with a number of problems. It was required to commence the actual placement and compaction of Zone 1 material at the 60-foot depth rather than at the 28-foot depth as planned. In addition, access to the bottom of the trench had been diminished because the upstream and downstream dam embankment areas were higher than anticipated because of the placement thereon of the material which was reexcavated in 1964. Finally, the appellant charges the Government with imposing harsh and unreasonable compaction requirements during backfilling (Appellant Posthearing Brief, 130).

Just as placement of the Zone 1 material commenced, and after

grouting had been completed, seepage of water out of the cutoff trench floor was detected. The water would seep into and soak the backfill that had been placed (39 Tr. 4316). The grout had not sealed off several small springs in the rock (which was, according to Steenberg, the Government's responsibility since it allegedly controlled the amount of grouting installed).

At the time backfilling with Zone 1 material commenced, appellant already had a dewatering system in effect, pursuant to Paragraph 47 of the specifications, consisting of french drains operated by pumps. After the seepage was encountered, the contractor contends that the Government specifically directed it to install an additional system utilizing drain pipe to pump out the water (39 Tr. 4316-17). The Government, however, claims that the contractor was free to use any methods it wanted to and that no direction was given.

This additional system required installation of an estimated 2,500 lineal feet of pipe in all. Some of the pipe was placed in trenches in the floor of the cutoff trench in an irregular pattern designed to enhance interception of the water coming through the rock. To fit the irregular trenches bending of the pipe by means of a cutting torch was necessary and the pipe was then welded together and perforated. Some 30 to 40 vertical pipes were connected to those laid horizontally in the cutoff trench floor. These were subsequently grouted. Inasmuch as

backfilling was continuing at this time appellant was obliged to perform a substantial amount of hand compaction around the pipes, even after the fill was of sufficient height to permit use of the Zone 1 tamping, or sheepsfoot roller, because of potential damage to the pipes from that type of roller. Additional intrusion of moisture during the backfill operation required the appellant to haul in rock and place it by hand and by front-end loader on the outside edge of the Zone 1 slope (39 Tr. 4317-21).

In placing the Zone 1 material the appellant was also compelled to use hand compaction with pneumatic compactors, instead of the sheepsfoot rollers, when it worked in the bottom of the trench. This was caused by the lack of room in which to maneuver the heavier equipment.⁴⁴ Compaction by sheepsfoot rollers (instead of by hand) could not commence until the Zone 1 backfill had been placed to a level approximately 20 feet above the bottom of the trench.

Placement of the material was difficult. Only borrow from Borrow Area No. 2 (which was downstream) could be used because of transportation problems (39 Tr. 4334). Even so it was necessary to transport the Zone 1 material from Borrow Area No. 2 first down into the valley floor, then up an approach ramp and over the downstream Zone 3 embankment, and ultimately into the cutoff trench.

The appellant also contends that it was required to utilize multiple-handling techniques, at a great loss of efficiency, in placing the first 10 feet of Zone 1 backfill (39 Tr. 4337). The Zone 1 material had to be dumped on the upper portion of the trench ramp, then pushed with a bulldozer to a dragline which deposited the material in the trench, and then the material was spread by means of a front-end loader. In placing the next 10 feet of backfill, the appellant continued the dragline operation but was able to use a larger bulldozer together with the front-end loader.

Compaction of Zone 1 Material

While the contractor was placing Zone 1 material in the dam embankment between September and November 1964, the Government rejected certain of the proposed fill and ordered removal of other fill already placed, on the ground that the compaction thereof did not comply with the specifications. In appellant's view the "excessive compaction requirements" so imposed upon it by the Government constitute the "most invidious" of the Government's actions or omissions relating to the Zone 1 backfill (Appellant Posthearing Brief, 139).

The appellant contends that the Government's rejection criteria were based upon the utilization of the Proctor "D" value compaction density test that was not a part of the specifications. According to the appellant the specifications applicable to compaction contain no specific

⁴⁴ Hand compaction methods also were used in compacting against the abutments and around the dewatering pipes (34 Tr. 3796-97).

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provision relating to density other than the requirement that 12 roller passes be made over the material (Appellant Posthearing Brief, 141). The "D" ratio test was contained in the Government's design considerations as the applicable standard (Appellant Exhibit C-20), but was allegedly withheld from the contractor. In addition, the Bureau is said to have conducted the compaction density test under improper conditions, while equipment was being operated (54 Tr. 5978-79).

As a consequence of the Bureau's actions regarding compaction, the appellant claims it:

* * * had a lot of additional expense in reaching this extra high density requirement * * * [and it] had * * * more earth to compact * * * there was more to be hauled in, so the more [it] hauled in the more [it] had to compact. (39 Tr. 4332)

The appellant contends that it was not paid for the special compaction of Zone 1 material in the dam where Zone 1 joins Zone 2, or Zone 1 joins excavation embankment, and also around grout pipe (Exhibit No. 100).

The provisions applicable to compaction are Paragraphs 62, 63, and 64.⁴⁵

⁴⁵ The pertinent parts are as follows:

"62. *Embankment Construction, General*

"b. Placing provisions.—Construction of the dam embankment shall be subject to the following placement conditions:

"(5). The slopes of transverse bonding surfaces (surfaces normal to the centerline crest of dam) between previously completed portions of Zone 1 embankment and Zone 1 embank-

There are three key provisions of Paragraphs 62 and 63 respecting Zone 1 placement. The material is to be placed in horizontal lifts

ment to be placed shall not be steeper than 3:1. Slopes of transverse bonding surfaces between previously completed portions of Zones 2 and 3 embankment and Zones 2 and 3 embankment to be placed shall not be steeper than 1 and 1/2:1.

"c. Measurement and payment.—* * *

"Except for riprap, the payment for placing, conditioning on the fill, and compacting will be in addition to the payment made for the excavation and transportation of the required materials. Payment for the excavation of the materials shall include the cost of excavation, preconditioning the material as required, transporting materials, and rehandling excavated materials deposited temporarily in stockpiles. It may be feasible to transport a portion of the materials which are excavated for other parts of the work and which are suitable for embankment construction, directly to the embankments at the time of making the excavations, but the contractor shall be entitled to no additional compensation above the unit prices bid in the schedule by reason of it being necessary, or required by the contracting officer, that such excavated materials be deposited temporarily in stockpiles prior to being placed in the embankment. The cost of preparing bonding surfaces, including excavation of keyway trenches and refilling such trenches in transverse bonding slopes, and all other operations required to secure adequate bond between embankment in place and embankment to be placed shall be included in the unit prices bid for items of constructing embankments.

"63. *Earthfill in Dam Embankment, Zone 1*

"a. General.—The earthfill, Zone 1 portion of the dam embankment shall be constructed in accordance with this paragraph.

"b. Preparation of foundations.—No material shall be placed in any section of the earthfill portion of the dam embankment until the foundation for that section has been watered, suitably prepared, and has been approved by the contracting officer. All portions of excavations made for test pits or other subsurface investigations and all other existing cavities, fissures, and irregularities found within the area to be covered by earthfill, Zone 1, which extend below or beyond the established lines of excavation for dam embankment foundation, shall be filled with earthfill materials and compacted as specified for earthfill in dam embankment, Zone 1, and

which are to be compacted to layers not more than six inches in thickness after rolling. The material is to be rolled 12 times with the particular roller specified. The material is to have a uniform moisture content which is to be slightly below optimum. As for the provisions concerning special compaction of Zone 1,

contained in Paragraph 64, the key term is that the special compaction is to be equal to that obtained with the adjacent roller compaction.

At the hearing, Dr. Jack W. Hilf, Chief Designing Engineer for the Bureau of Reclamation, discussed the meaning of the specifications. He testified that the failure to ob-

payment therefor will be made as provided for earthfill in Subparagraph *h*.

* * * * *

"d. Moisture control.—The moisture content of the earthfill material prior to and during compaction shall be distributed uniformly throughout each layer of the material. The allowable ranges of placement moisture content are based on design considerations. In general, the average placement moisture content will be required to be maintained slightly below the Bureau of Reclamation laboratory standard optimum condition. This standard optimum moisture content is defined as, 'That moisture content which will result in a maximum dry unit weight of the soil when subjected to the Bureau of Reclamation Proctor Compaction Test.'

"The compaction tests will be made by the Government. The Bureau of Reclamation Proctor Compaction Test is the same as ASTM Designation: D 698-58T, except that a 1/20-cubic-foot compaction mold is used and the rammer is dropped from a height of 18 inches.

"As far as practicable, the material shall be brought to the proper moisture content in the borrow pit before excavation, as provided in Subparagraph 59c. Supplementary water, if required, shall be added to the material by sprinkling on the earthfill and shall be mixed uniformly throughout the layer.

"e. Placing.—The distribution and gradation of the materials throughout the earthfill shall be such that the fills will be free from lenses, pockets, streaks, or layers of material differing substantially in texture or gradation or moisture from the surrounding material. The combined excavation and placing operations shall be such that the materials when compacted in the earthfill will be blended sufficiently to secure the best practicable degree of compaction and stability. Successive loads of material shall be dumped on the earthfill so as to produce the best practicable distribution of the material, subject to the approval of the contracting officer, and for this purpose the contracting officer may designate the locations in the earthfill where the individual loads shall be deposited, to the end

that the most impervious materials shall be placed in the central portion of the earthfill and the more pervious materials shall be placed so that the permeability of the fill will be gradually increased toward the upstream and downstream slopes of the earthfill.

"* * * The material shall be placed in the earthfill in continuous, approximately horizontal layers not more than 6 inches in thickness after being rolled. * * *

"f. Rollers.—Tamping rollers shall be used for compacting the earthfill. The rollers shall meet the following requirements:

* * * * *

"g. Rolling.—When each layer of material has been conditioned to have the required moisture, as provided in Subparagraph *d*, it shall be compacted by passing the tamping roller over it 12 times, and when compacted the density shall be essentially uniform throughout the layer. If the moisture content is less than that required, the rolling shall not proceed except with the specific approval of the contracting officer, and, in that event, additional rolling shall be done, as directed by the contracting officer, to obtain the required compaction, and no adjustment in price will be made therefor. If the moisture content is greater than that required, the material may be removed and stockpiled for later use or the rolling shall be delayed until such time as the material has dried so that it contains only the required moisture content, and no adjustment in price will be made on account of any operation of the contractor in removing and stockpiling or in drying the materials. If, with the required moisture content, it is found desirable to roll each 6-inch layer more or less than 12 times to obtain the required compaction, the number of rollings shall be changed accordingly, as directed by the contracting officer, and adjustment will be made in the unit price bid for earthfill in dam embankment, Zone 1, in the amount of 35/100 cent per cubic yard for each additional or lesser number of rollings required.

"h. Payment.—Payment for earthfill in dam embankment, Zone 1, will be made at the unit price per cubic yard bid therefor in the

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tain a "D" value of 98 percent following compaction in the dam meant either that the contractor had not rolled the material 12 times, or it did not have the proper moisture content (too wet or too dry), or it had been compacted in too thick a lift (53 Tr. 5873).

Therefore, based upon Dr. Hilf's testimony, the Government's posi-

schedule, which unit price shall include the cost of placing, supplementary wetting, and roller compacting the earthfill material in dam embankment, Zone 1: *Provided*, That an adjustment of the unit price bid will be made in each case in which it is required that the contractor make more or less than 12 roller passes as provided in Subparagraph *g*. Where portions of the earthfill in dam embankment, Zone 1, require special compaction, payment therefor will be made as provided in Paragraph 64.

"64. Specially Compacted Earthfill, Zone 1

"In the locations listed below, the earthfill, Zone 1, shall be specially compacted as specified herein:

* * * * *

"b. Portions of the earthfill in dam embankment, Zone 1, where designated by the contracting officer at steep and irregular abutments, and on rough and irregular embankment foundations.

"Material use in specially compacted earthfill shall conform to materials required for dam embankment, Zone 1. The material shall be obtained from excavation in Borrow Areas No. 1, 2, and 4.

*"All specially compacted earthfill, Zone 1 material shall be placed in accordance with Subparagraph 63e: *Provided*, That earthfill, Zone 1 material to be specially compacted may require placement in layers thinner than those required for roller compaction of Zone 1 material to obtain the desired compaction with the equipment used. Where the foundation or compacted surface of any layer is too smooth to bond properly with the succeeding layer, it shall be scarified or otherwise roughened to provide a satisfactory bonding surface before the next layer of earthfill material is placed. When each layer or material has been conditioned to have the required moisture content, it shall be compacted by special rollers, mechanical tampers, or by other approved methods. All equipment and methods used shall be subject to approval. The moisture control and compaction shall be equivalent to*

tion is that the "D" ratio is not an extra contractual test but is only an accurate measure of the contractor's compliance with the specifications. That is, the "D" value merely measures whether a contractor has, in fact, rolled the layer in question 12 times, whether the material has the uniform moisture content required, and whether the material has the proper thickness of lift.⁴⁶

that obtained in the earthfill placed in the dam embankment in accordance with Subparagraphs 63d. and *g*.

"Measurement, for payment, of specially compacted earthfill, Zone 1, will be made of the material specially compacted, as provided in this paragraph, to the lines and grades shown on the drawings or otherwise established by the contracting officer. Under b. above, measurement, for payment, of specially compacted earthfill at steep and irregular dam abutments will be limited to a thickness of 2 feet measured horizontally from the average contacts where practicable, or as otherwise determined by the contracting officer; and measurement, for payment, of specially compacted earthfill on rough and irregular embankment foundations will be made in the most practicable manner as determined by the contracting officer. Payment for specially compacted earthfill, Zone 1, will be made at the unit price per cubic yard bid therefor in the schedule, which unit price shall include only the cost of placing, moistening, and specially compacting the earthfill, Zone 1 material. Payment for excavation and transportation of the material used in specially compacted earthfill, Zone 1, will be made at the unit price per cubic yard bid in the schedule for excavation in borrow areas and transportation to dam embankment."

⁴⁶ Government Posthearing Brief, 330. The appellant, however, at 144 of its Posthearing Brief, points to the testimony of Mr. Fred Walker (54 Tr. 5987-89), who directed the preparation of the design considerations. Mr. Walker stated that both the moisture variation and the type of compacting equipment used had a significant bearing on the "D" ratio. He said that there are many varieties of power tamping machines available with each producing a different result. Review of Mr. Walker's testimony indicates that he was referring to special compaction machines and not roller equipment.

Administration of Compaction Testing

The Government has conceded that "there were discrepancies * * * by certain field personnel" in the administration of the specifications, including the test methods employed (Posthearing Brief, 331). It is undisputed that the Bureau designers at Denver instructed the field forces to use the 95 percent "D" value as a basis for rejection.

However, as described by Mr. Wilcox, Mr. Christensen, who was his immediate supervisor, instructed him to obtain "D" values of 100 percent (Appellant Exhibit C-246, pp. 676-7). Thereafter, Mr. Christensen reduced the required ratio to 98 percent (52 Tr. 5807-08). Mr. Christensen's instructions were enforced for approximately one month when the contracting officer's representative countermanded them and instructed Mr. Wilcox to return to the designer's criterion of 95 percent "D" value (52 Tr. 5810). The contracting officer's representative was Mr. C. E. Klingensmith who succeeded Mr. Woods in that capacity on September 29, 1964.

The Government has "admitted that Mr. Christensen issued some instructions which were somewhat beyond the intention of the designers as to" compliance with the contract standards (Government Posthearing Brief, 333). Nevertheless, the Government questions if "the contractor has been put to any additional expense by virtue of Mr. Christensen's erroneous instructions

which were in force for something less than a month."⁴⁷

Mr. Walker testified that the normal rejection percentage anticipated is approximately 16 percent (55 Tr. 6098). According to Government Exhibit B-411, however, it is said that only 17 out of some 200 roller tests were rejected, which is less than 10 percent and considerably under the normal percent of rejection.⁴⁸

The Government's position, also, is that the appellant has not requested any relief under the avenue provided for in the contract, Subparagraph g. of Paragraph 63. Subparagraph g. calls for "adjustment * * * in the unit price bid for earth-fill in dam embankment, Zone 1, in the amount of 35/100 cent per cubic yard for each additional * * * number of rollings required."

In addition to claiming that the Government imposed excessive compaction requirements, the appellant contends that the Government "exacerbated" the problem by conducting the tests improperly (Appellant Posthearing Brief, 152). Mr. Walker conceded that on September 25,

⁴⁷ Government Posthearing Brief, 334. The appellant, contends that "the records of testing on Exhibit B-411 indicate" that the Government did not revert to the 95 percent standard (Appellant Posthearing Brief, 153).

⁴⁸ 54 Tr. 5964. Mr. Walker testified that a total of 353 tests were made, consisting of 72 power tamp, 47 pneumatic roller, and 234 roller compaction. There were a total of 41 to 47 rejections: 13 to 17 power tamp, 11 to 13 pneumatic roller, and 17 roller compaction. He indicated that 26 of these tests were borderline. Ten were rejects, eleven were not rejected, and the others were so close that he supported the field personnel in rejecting them because they were matters of judgment (54 Tr. 5958-60).

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1964, the Government field personnel performed the density test while other equipment was being operated. He "told them not to take a test where the equipment was working because the vibration might disturb the results" (54 Tr. 5978-79).

Special Compaction

In the course of appellant's dewatering operation in the cutoff trench, it installed three corrugated metal standpipes of 18-inch diameter.⁴⁹ On or above the excavation slopes in overburden, the appellant also installed grout riser pipes in order that the rock drains it had used in the cutoff trench for dewatering could be filled with grout. As the contractor was unable to compact Zone 1 embankment adjacent to the standpipes or the grout riser pipes with the sheepsfoot roller it was using, appellant elected to attain this compaction by using pneumatic tampers.

The dispute here is over the quantity of special compaction performed. The contractor contends that the quantity of material compacted around the standpipes by the special compaction methods should be computed for payment under Item 14 of the contract bid schedule (Specially compacted earthfill, Zone 1).

The Government asserts that the special compaction of material around the standpipes is a cost gov-

erned by the terms of Subparagraphs c. and d. of Paragraph 47 of the specifications, relating to removal of water from foundations and payment for diversion and care of the stream during construction. It is the Government's position that under those provisions the appellant covered or should have covered the cost of such special compaction around the standpipes under the dewatering item. The Government maintains that payment under Bid Item 14 was not applicable to this expense.

The Government also asserts that it made payment for specially compacted Zone 1 under Item 14 in accordance with Subparagraphs a. and b. of Paragraph 64. They provide that special compaction shown on the drawings and under Subparagraph b. is to be placed in portions of Zone 1 embankment at steep and irregular abutments and on rough and irregular embankment foundations. Payment was made pursuant to the "measurement for payment" clause of Paragraph 64 quoted *supra*. According to the contracting officer, the "quantity of special compaction included all compacted embankment below elevation 5,780, the Zone 1 along both abutments, and some Zone 1 compacted around irregularities on the upstream and downstream slopes of the core trench" (Exhibit No. 251, par. 215).

In addition, the contracting officer found that in connection with Bid Item 14, the contractor had a substantial underrun (Exhibit No.

⁴⁹ The standpipes are shown, marked in green, on Government Exhibits B-399 through B-404.

251, pars. 188 and 189). He determined that the actual or expected final quantity performed was 4,458 cubic yards, while the estimated quantity was 8,000 cubic yards. Mr. Angel, however, testified that on the basis of his experience in directing the compaction of Zone 1, he did not consider an underrun to have been possible (39 Tr. 4331).

Under Paragraph 18 (Quantities and Unit Prices) of the specifications either party is entitled to an equitable adjustment in contract price when the actual quantities of any of the items marked in the schedule with an asterisk amount to more than 120 percent or less than 80 percent of the estimated quantities. Item 14 is so designated on the bid schedule.

Subparagraph e. of Paragraph 18 governs the procedure to be followed in the event of an underrun. Subparagraph e. provides:

e. When the actual quantity of an item is less than 80 percent of the estimated quantity, final payment for the item will be computed by applying the unit price bid in the schedule to the actual quantity, and then adding to the result an amount obtained by applying to the number of units of underrun below the 80 percent of the estimated quantity, a reasonable allowance per unit for the contractor's mobilization and other fixed costs relating thereto.

According to the contracting officer, that quantity of the underrun amounting to 1,942 cubic yards qualified for adjustment under Paragraph 18e (Exhibit No. 251, pars. 188 and 189). However, the contracting officer held that the ap-

pellant did not submit its proposal of a reasonable allowance per unit for its mobilization and other fixed costs to be applied to the underrun. In the absence of such cost data from the appellant, he denied any adjustment "on the grounds of lack of evidence."

We now turn to Change Order No. 1 which relates to the cutoff trench claim.

Order For Changes No. 1

Order For Changes No. 1 was issued by the contracting officer on April 16, 1965 (Exhibit No. 2). It ordered the following change "in the drawings and/or specifications":

1.⁵⁰ Confirming earlier field instructions to you during the summer of 1963, and in order to eliminate possibility of water percolation under the dam after completion, you are directed to excavate the cutoff trench between Stations 5+50 and 7+51.8 to revised slopes and grades as staked by the Government in the field and as directed by the contracting officer. Since you had already completed on August 30, 1963, excavation of the cutoff trench to a depth of 28 feet (elevation 5802.3) at the time the cutoff trench was restaked to a new depth with revised slopes, you were requested to return men and equipment to the cutoff trench area which was restaked. The work you performed involved excavating to revised grades and slopes in an area previously excavated; thus, accessibility was decreased and the excavation had to be performed by more costly methods than was the case under the originally required excavation.

The contracting officer then found that the change caused increased

⁵⁰ The subsequent provisions of the change order are not numbered.

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costs in four items of work in the cutoff trench.

The Change Order provides that:

The increased costs resulting from the above-described change in cutoff trench excavation requirements are compensable under * * * Paragraph 51 of the specifications [Open-Cut Excavation, General], which states, in part, as follows:

"During the progress of the work, it may be found necessary or desirable to vary the slopes, grades or the dimensions of the excavations from those specified herein. Any increase or decrease of quantities excavated as a result of such variations will be included in the estimates which shall be subject to the provisions of Paragraph 18 [Quantities and Unit Prices]. However, if the contracting officer determines that the contractor's costs of performing the work will be increased by reason of such variations an equitable adjustment will be made to cover such increased costs. Otherwise, the work will be paid for at the unit price bid therefor in the schedule regardless of such variations except as may be covered under Paragraph 18."

Thereupon, citing both Paragraph 51, as quoted above and the Changes clause, the contracting officer found that the appellant "incurred increased costs and delay in performance of contract work as a result of restaking the cutoff trench after [it] had performed excavation to the originally staked elevation." He ordered the following:

Adjustment of the amount due under the contract or in the time required for its performance by reason of the change * * *:

a. From volumetric measurements by the Government, it has been determined that you excavated a total of 20,964 cubic yards of material from the cutoff trench after it was restaked and that your total costs for such excavation, as represented

by hourly usage of equipment fully operated and maintained during this period amount to \$44,173.15.⁵¹ * * * Since you have previously received payment for this additional material at the unit price of \$0.24 per cubic yard, the amount of \$5,031.36 (20,964 cubic yards times \$0.24), must be deducted from the total costs incurred as the result of the additional excavation performed in the cutoff trench. Thus, the total net payment to which you are entitled as an equitable adjustment amounts to \$44,173.15 less \$5,031.36, or a total of \$39,141.79.

b. I find that as a result of the restaking done by the Government, your work in the cutoff trench was projected into a winter season, thereby making it impossible * * * to complete the necessary construction of the grout cap and the grout curtain prior to winter shutdown in the winter of 1963-64. As a result, you continued dewatering from the date you completed the originally staked excavation on August 30, 1963, until February 28, 1964. You performed preparatory work to dewatering for the 1964 construction season commencing on March 11, 1964, and resumed dewatering on June 10, 1964, continuing until such time as the cutoff trench was completely excavated and the first Zone 1 embankment placed on September 5, 1964. I find that an equitable adjustment for your unwatering costs would be properly represented by such cost to you for this work as actually performed during the period * * * mentioned, as decreased by such portion of your costs under Item 1 of the schedule (Diversion and Care of Streams during Construction and Removal of Water from Foundations) allocable to the cutoff trench work. From Government costs records, your total costs of unwatering during the entire period from July 29, 1963, to February 28, 1964, and March 11, 1964, to September 4, 1964, as represented by

⁵¹ The equipment expense for item a. and the following items b. through d. were computed as provided in Paragraph 21 (Equipment Allowances for Contract Adjustments).

hourly usage of equipment fully operated and maintained amounted to \$124,471.01. Your contract price for Item 1 as allocated to cutoff trench work under Items 2, 3, and 4 of your diversion plan [52] * * * amounts to \$20,000. Since you have previously received payment for this work, the sum of \$20,000 must be deducted from your total unwatering cost. Thus, the total net payment to which you are entitled as an equitable adjustment amounts to \$124,471.01 less \$20,000, or a total of \$104,471.01.

c. I find that the necessity for furnishing and placing a corrugated-metal pipe to handle stream diversion was required solely as a result of projection of cutoff trench work into the winter season. Therefore, you are entitled to the entire cost of such pipe construction, amounting to a total payment to you of \$1,293.36.

d. I find that you are entitled to payment for certain miscellaneous materials used in performance of the work in question during the periods in which excavation and unwatering costs, as stated above, were incurred * * * as follows:

- 36 surplus fuel tanks
- 265 feet of 8-inch concrete pipe
- 48 feet of 2-inch black pipe
- oil used in keeping slopes thawed and dry
- * * * in [the] total amount of \$2,924.11.

The contracting officer then calculated the total net adjustment in the amount due under the contract, consisting of items a. through d., *supra*, as \$147,830.27. This sum included an allowance of 15 percent for the appellant's overhead and profit.

The contracting officer next addressed the question of the adjustment in the time required for performance of the contract by reason of the change ordered. He held that

as a result of the restaking of the cutoff trench, the contractor was delayed in the continued performance of contract work from the time it completed excavation to the originally staked depth and slopes until the time that it completed excavation to bedrock on October 9, 1963, a total of 40 calendar days.

He also held that the contractor was entitled to an extension of time for the period represented by the time it was engaged in excavation and dewatering in the cutoff trench during the period from June 10, 1964, until cutoff trench excavation was completed and the first placement of Zone 1 material was made on September 5, 1964, a total of 87 calendar days.

This time extension and the previous one mentioned total 127 calendar days. As appellant's original contract completion date was September 29, 1965, the contracting officer determined that adding the extension of time of 127 days to that date would project the contract time into the 1965-66 winter season. Accordingly, he held that the appellant was "entitled to an extension of contract time during the remainder of the 1965 construction season and from the date on which work can be commenced in the spring of 1966."

Since Government records of appellant's past performance and appellant's construction schedules indicated that appellant would shut down operations for the winter on November 15 and would resume work on April 15, the contracting officer proposed an extension of time

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in the amount of 47 calendar days in 1965. As for the other period of extended time, 80 calendar days, it was to run after resumption of operations in the spring of 1966. The effect of this determination would be to extend the contract completion date to July 4, 1966. However, the contracting officer emphasized that the extended date could not be definitely determined at this time, since the actual shutdown dates were not then known, except that the contractor would receive a time extension of 127 calendar days plus the period of actual, necessary 1965-66 winter shutdown.

Finally, the contracting officer pointed out that the adjustments stated were "based solely on Government records in the absence of any supporting data having been furnished by the contractor." He invited the appellant to submit information regarding "any claimed additional increased costs or time extension" within 30 days of receipt of the order.⁵³ Pending such time the payments were to be "considered tentative and subject to later adjustment." If the contractor did not so submit the additional data, the tentative adjustments provided were to become final.

Following the issuance of Change Order No. 1, the appellant submitted its "computation of the mini-

mum extra costs incurred in the core trench work as a result of changed conditions and changes affecting that work," dated June 21, 1965 (Exhibit No. 178, p. 1). It set forth, at p. 2, the following "partial list of items" the additional cost of which the Government allegedly failed to take into account in preparing Change Order No. 1:⁵⁴

1) There has been no allowance for added cost of placing fill at the greater depth of the core trench.

2) There has been no payment for extra compaction work around the pipes left in place for pumping.

3) There has been no allowance on extra hand compaction around the perimeter of the core trench.

4) There has been no allowance for stockpiling and multiple handling of materials due to unforeseen delay in completion of core trench.

5) There has been no compensation for the deep excavation of material from slides in the core trench due to water action over the winter. In this respect it should be noted that this additional excavation is more expensive than the unit price and since this goes beyond neat lines, the contractor has not even received the unit price. There was also a substantial amount of extra handling in the way of "ramping" to get material out at the greater depth and because of the necessity of stockpiling incidental to excavating at the greater depth. Order for Change No. 1 also allows nothing for the extra cost of excavation on the sides of the core trench beyond the original slope lines above the 28-foot elevation.

6) There has been no allowance for costs of moving in and out with additional and different machinery because of the changed requirements of excavating at the greater depth.

7) It should be specifically noted that

⁵³ Under Paragraph 21a. of the specifications, the contractor is to furnish a complete description of each item of equipment involved. The appellant did not do so and it was therefore necessary for the contracting officer to estimate the age of equipment, capacity, model numbers, and, in some cases, the manufacturer (Exhibit No. 221, par. 9).

⁵⁴ According to the Government, the "partial list" was not supplemented (Government Post-hearing Brief, 499; Exhibit No. 221, par. 16).

the Bureau has made no allowance to the contractor for damages suffered on sub-contract work which was delayed and disrupted by the change in the core trench.

8) Underallowance for such items as dewatering.

The contractor then listed the following costs attributable to these items of work:

1. M & S core trench excavation 8/3/63 through 11/2/63-----	\$243,162.51
2. Steenberg core trench excavation 11/17/63 through 2/23/64-----	36,037.57
3. Steenberg core trench excavation 3/1/64 through 9/4/64-----	74,911.46
4. Steenberg core trench fill from rock to original ground 9/13/64 through 11/2/64-----	215,512.20
5. Added cost of drilling and grouting contract with Continental due to loss of intrusion Prepaht contract because of delay caused by core trench changes-----	88,946.29
6. Added cost of placing and removing revised culverts due to winter layover on core trench-----	16,612.87
7. Added cost of removing and repairing grout cap due to unstable rock developed over winter-----	1,690.00
8. Rented equipment, idle for 12 months--	250,225.50
9. Corporate equipment, idle for 12 months--	270,010.32
10. Interest due because Bureau did not process change order for core trench, or make proper progress payments on same-----	45,093.80

11. Costs to date spent on uncovering and preparing costs and claims due to Bureau changes and errors -----	42,405.05
12. Six months added supervision -----	43,879.25
Total -----	⁵⁵ \$1,328,486.79

⁵⁵ The item numbers correspond to the exhibits identified by Roman numerals which appellant attached to its letter of June 21, 1965 (Exhibit No. 178). Exhibit I incorrectly shows a total of \$243,162.69 instead of \$243,162.51. Exhibit XII incorrectly shows a total of \$43,487.25 instead of \$43,879.25. By letter dated March 18, 1965 (Exhibit No. 147), the appellant submitted a claim totaling \$2,159,048.57, of which amount it allocated 48-50% to the cutoff trench claim. This would amount to a cutoff trench claim of between \$1,036,000 to \$1,080,000.

The appellant also asserted that it was due an additional extension of time amounting to 57 days. This amount was comprised of an extra 24 days because M & S reached "proper bottom for core trench areas" on November 2, 1963, and not October 9, 1963 (as provided in Change Order No. 1), and 33 days (calculated as $\frac{2}{3}$ of seven weeks) required to bring the largely increased quantity of backfill to original ground.

In addition, the appellant claimed that it was entitled to the added cost of placing fill in the cramped and dry areas of the trench, and the cost of compaction around all sides and around the pumping pipes. These, according to the contractor, became "more obnoxious due to their distance out in the core trench, caused by the added depth."

In Findings of Fact No. 1 (Exhibit No. 221), the contracting officer reviewed the various items referred

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to by the appellant *seriatim*. He denied all of the claims presented, but based upon equipment rental rate data furnished by appellant's letter dated July 20, 1965 (Exhibit No. 189), he revised the total net adjustment provided by Change Order No. 1 from \$147,830.27 to \$154,866.64 or an increase of \$7,036.37.⁵⁶

The contracting officer drew a distinction in the treatment of the appellant's equipment allowances as between Change Order No. 1, on the one hand, and Change Orders 2, 3 and 4, on the other. Equipment allowances for contract adjustments are governed by Paragraph 21 of the specifications.⁵⁷ Applicability of the AGC rates referred to in Paragraph 21 is one of the most significant issues in this appeal.

The contracting officer determined that the work covered by Change Orders 2, 3 and 4 constituted miscellaneous minor items of extra work for which additional compensation was due the contractor pur-

suant to the Extras Clause. However, with respect to the cutoff trench work covered by Change Order 1, which he characterized as long-term major changes or changed conditions, the contracting officer considered the equipment rates computed by the AGC formulae to exceed the appellant's actual cost properly chargeable to the equipment utilized therein, and regarded them as particularly unsuitable for the purpose of determining equitable adjustments under the "total cost" approach advanced by the contractor here. Nevertheless, in the absence of actual cost experience data from the appellant at the time Change Order No. 1 was unilaterally issued, and in order to be "completely fair" to the contractor, so as to reimburse it for actual increased costs "incurred as a result of the core trench change," the contracting officer adopted rates as computed by the AGC schedule in determining the equitable adjustment therein allowed.

In its letter of June 21, 1965 (Exhibit No. 178) the appellant stated that it had used Associated Equipment Dealer rental rates in computing the equipment costs. The contracting officer, however, determined that reliance on the AED rental rate schedule for computation of the contractor's equipment use rental rates was inappropriate and not in accordance with the provisions of the contract.

The contracting officer reasoned that rental rates computed in accordance with the AED rental

⁵⁶ The contracting officer also reduced the time extension previously allowed by two days, resulting in a new contract completion date of July 2, 1966. In addition, he determined that the compaction claims were "unrelated specifically" to the appellant's core trench claim and reserved consideration of them until Findings of Fact No. 2.

⁵⁷ Paragraph 21 provides for the use of a publication of the Associated General Contractors of America, entitled "Contractors' Equipment Ownership Expense," in effect on the date of the contract, in connection with equipment allowances for contract adjustments. The 1962 edition (Government Exhibit B-624) is applicable here. The rates developed under Paragraph 21a. are to be utilized in the case of extra work ordered pursuant to Paragraph 7 (Extras) of the General Conditions. However, under Paragraph 21f., such rates are optional with respect to adjustments made pursuant to Clauses 3 (Changes) and 4 (Changed Conditions) of the General Provisions.

schedule cover an element of profit for equipment dealers and are in excess of rates computed by the AGC equipment ownership schedule. He also found that the appellant made an "improper application" of the AED rates in computing its alleged costs. In Exhibit No. 178, appellant indicated its awareness that the contract provided for second and third shifts to be paid at half rates, but nonetheless used full second and third shift rates. Under Paragraph 21d., as well as both the AGC and AED rate schedules, however, second and third shifts are to be paid at half shift rates.

Accordingly, the adjustment allowed by the contracting officer in the net amount of \$7,036.37 was computed on the basis of AGC rates in the absence, according to him, of any evidence of actual equipment expense.⁵⁸

In paragraphs 27 through 39, the contracting officer considered and disposed of the various claims made in the appellant's letter of June 21, 1965. He addressed himself first, to the claim for "added cost of placing fill." He denied this claim on the ground that "the requirement of the contract for 'backfill' of Zone 1 embankment was unchanged as a result of the * * * restaking

* * *

The contracting officer's position is that the appellant was required by Paragraph 53 of the specifications to excavate the trench to bed-rock and that a depth of about 55 feet (or elevation 5,780) should have been anticipated. In this connection he cited the profile of the dam on Drawing No. 526-D-2701 which shows the original ground surface in the valley at an approximate elevation of 5,835 and the assumed rock surface at 5,780, which is a difference of 55 feet.⁵⁹ In addition, the contracting officer found that the "Maximum Section" on that drawing shows a depth of the trench of approximately 60 feet.⁶⁰

The contracting officer also pointed out that Item 4 of the bid schedule indicated a quantity of excavation of 140,000 cubic yards. This, he found, was prepared on the basis of a core trench having a depth and side slopes as shown on Drawing 526-D-2701, which "could have been ascertained and substantiated by computations made by the contractor in bidding the work."

In addition, the contracting officer referred to Drill Holes 2 and 8, the logs of which appear on Drawings 526-D-2755 and 526-D-2754, respectively, and were available to the contractor prior to bid opening. According to him Drill Hole 2 is located near the center of the valley

⁵⁸ Of the 41 individual types of equipment used in computing the costs for Change Order No. 1, the appellant furnished the contracting officer with AGC rates for only 18. All 18 of these rates were found to be acceptable by the contracting officer and were relied upon by him in revising the costs in Findings of Fact No. 1 (Exhibit No. 221, par. 42C).

⁵⁹ The contracting officer also found that the "Maximum Section" of the drawing shows an "assumed rock surface" at the lowest portion of the cutoff trench.

⁶⁰ The contracting officer conceded that no elevation is shown at the bottom of the trench, requiring the depth to be scaled (Exhibit No. 221, par. 27).

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approximately 190 feet upstream from the trench, and showed bedrock at a depth of 55 feet. Drill Hole 8 located approximately 850 feet downstream from the core trench, near the center of the valley, shows bedrock at 57 feet.

The contracting officer thus concluded that regardless of the initial incorrect staking by the Government, the appellant either knew or should have known that it would be required to refill a trench with Zone 1 material to depths and side slopes substantially as were finally established after restaking.

With respect to the appellant's assertion that no allowance was made in Change Order No. 1 for damages suffered on subcontracted work which was "delayed and disrupted," the contracting officer found that it was but a duplication of appellant's claim for the added cost of grouting in the amount of \$88,946.28.⁶¹ He denied the claim on the ground that it was a "request for damages due to a Government-caused delay" for which no relief was provided in the contract.

In connection with the claim for the cost of moving in and out with additional and different machinery as a consequence of excavating at a greater depth, the contracting officer's position was that Government records disclosed only one piece of different machinery which was moved to the job specifically for core

trench work. This was a 1¾ cubic yard Link Belt Dragline which was rented from Syblon-Reid Construction Company and moved to the job on September 19, 1963. He found that the appellant had not submitted any evidence that additional items of machinery were involved.

The estimated cost for this dragline, he asserted, was included in the payment allowed by Change Order No. 1. In the overall adjustment provided for in Findings of Fact No. 1, provision was made for paying, in lieu of the estimated cost, the actual invoiced cost of renting the dragline. Accordingly, the claim was denied.

The contracting officer next addressed himself in Paragraph 30 to the claim for additional compensation for equipment, consisting of rented and corporate equipment, kept idle for twelve months. He denied the claim on the ground that it was for delay, which he had no authority to consider, corresponding to the length of the time extension sought by the appellant.

The claim for the cost of removing and repouring a portion of the grout cap referred to grout cap located in the bottom of the cutoff trench approximately at Station 7+10.⁶² According to the contract-

⁶¹ The contracting officer also stated if the claims were not in fact identical or involved a subcontractor other than Prepakt, appellant had failed to submit supporting evidence (Exhibit No. 221, par. 28).

⁶² After this portion of the grout cap was placed, the trench was flooded. Thereafter, following removal of the water, work was performed in the trench and material in the bottom, which was a hard, red shale, was loosened and had to be removed. This excavation exposed a portion of the grout cap and it was necessary to remove the grout cap, excavate the grout cap trench deeper, and then replace the grout cap (Exhibit No. 221, par. 31).

ing officer, this work was recognized as compensable at the outset and payment was made under the applicable schedule items for both placement of concrete and grout cap excavation. Accordingly, the claim was denied.⁶³

The contracting officer also denied the claim for interest allegedly due because the Government failed to make proper progress payments and process change orders timely. He held it to be a claim for damages which he was not authorized to consider. In addition, he found no merit to the claim for the reason that the appellant's notice of claim, dated November 8, 1963 (Exhibit No. 10), stated that details would be submitted as soon as they could be ascertained, but the details were not supplied until 20 months thereafter by appellant's letter of June 21, 1965 (Exhibit No. 178). In the meantime, the Government issued Change Order No. 1 unilaterally, based upon its own records. The Government's position, therefore, is that there was no such delay in processing or making progress payments which can be attributed to dilatory action by it.

With respect to the claim for dewatering, the contracting officer held that Change Order No. 1, as adjusted by Findings of Fact No. 1, provided for payment in full to the contractor of all its dewatering costs applicable to the core trench. On the

ground of lack of evidence to support any additional compensation, the claim was denied.

Similarly the contracting officer held that no further payment was due in connection with appellant's claim for stockpiling and multiple handling of material resulting from the unforeseen delay in completion of the trench. He found that Change Order No. 1 provided for payment of the appellant's total costs for excavating the core trench after it was restaked, less the payment which had already been made under Bid Item 4 (excavation for dam embankment foundation, at \$0.24 per cubic yard). He based his holding upon a review of Government records of equipment and labor hours which indicate that all of the contractor's actual costs for stockpiling, multiple handling of materials, excavation of slide material, ramping and excavation on the sides of the core trench outside of the originally staked lines were included in the change order.

In connection with appellant's assertion that it received "no compensation for the deep excavation of material from slides in the core trench due to water action over the winter," the appellant contends that a substantial amount of extra handling and "ramping" and stockpiling were necessary and this additional excavation is more expensive than the unit price and "goes beyond neat lines," but that it did not receive the unit price therefor. The contracting officer, however, determined that all of these items were

⁶³ Of the cost of \$1,690 alleged for this work, \$600 consisted of the cost of excavation of the grout cap trench and placing of concrete both at extra depth. This portion of the claim was denied on the ground that the extra depth should have been anticipated.

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in fact already included in the payment provided by Change Order No. 1.

He also pointed out that computations for the neat line quantity excavated, after the core trench was restaked, were made on the basis of a 30-foot bottom width of trench and side slopes having a ratio of $1\frac{1}{2}:1$ (horizontal:vertical) and the amount of material for which payment was made amounted to 20,964 cubic yards. According to the contracting officer, the slide material, at least in part, was outside the neat lines before sliding into the trench. Consequently, he did not deny appellant's assertion that payment was not received for the material outside the neat lines under Bid Item 4.

Nevertheless, the Government's position is that its failure to pay the appellant for the excavation outside neat lines under Bid Item 4 is actually to the appellant's advantage because in Change Order No. 1 the amount paid the contractor pursuant to Bid Item 4 was deducted from the total cost of excavation, with the balance paid under the order. Any increase in the amount for which payment was made under the contract would be subject to deduction from the amount provided for payment by virtue of the change order. Therefore, the contracting officer asserts that the appellant was actually paid for this excavation, by reason of Change Order No. 1, at a higher unit price than it would have received had it been paid under Item 4.

In part for this reason, the contracting officer refused any additional relief to the appellant resulting from the underrun in connection with Bid Item 4. The contracting officer found that the appellant completed 94.1 percent of the estimated final quantity which amounted to 56.9 percent of the schedule quantity (140,000 cubic yards), or 27,415 cubic yards below 80 percent of the schedule quantity. Under Paragraph 18 an adjustment is made in the event of overruns exceeding 120 percent of the estimated quantity and underruns below 80 percent of the estimated quantity. The contracting officer, however, determined that the adjustment made by him pursuant to Change Order No. 1 precluded an allowance under Paragraph 18.⁶⁴

The contracting officer regarded appellant's claims for its alleged cost of "uncovering" and preparing its claims and additional overhead as claims for damages which he had no authority to consider. He pointed out that supervision is an item of overhead for which the contractor had requested compensation under

⁶⁴ However, at 99 of its Posthearing Brief, the Government freely concedes that the contractor is entitled to an adjustment under the provisions of Paragraph 18 because of the underrun in the quantity of Bid Item 4, Excavation for Dam Embankment Foundation. The Government's position is that no adjustment is forthcoming because the appellant failed to comply with the specific proof required by Paragraph 18. Further discussion of the applicability of Paragraph 18 to the Item 4 underrun will be found in the portion of this opinion devoted to overruns and underruns in the Termination for Default section *infra*.

the other individual claims enumerated in its letter of June 21, 1965. In addition, the contracting officer relied on the fact that in the payment provided by Change Order No. 1, as adjusted by Findings of Fact 1, an allowance was made to cover appellant's overhead and profit amounting to 15 percent.

Finally, the contracting officer considered and denied appellant's claim for an additional time extension. He held that based upon Government records the core trench excavation was substantially complete on October 9, 1963, and not November 2, 1963 (as alleged by the appellant). He also determined that the appellant was not entitled to an additional 33 days for backfilling the trench because there was no change in the backfill requirement from that set out in the contract.

Decision

The Government has admitted that it "mis-staked the depth of the cutoff trench in the first instance," as a result of which "it was necessary for the contractor to excavate to the eventually required depth in an uneconomical way which the Contracting Officer * * * determined to be the responsibility of the Government" (Government Posthearing Brief, 61). The Government maintains that it paid for all of the appellant's cutoff trench expenses, including dewatering from the time the cutoff trench was restaked on September 3, 1963, through the completion of excava-

tion operations on September 5, 1964.

The appellant contends that the allowance made by the contracting officer in Change Order No. 1, as adjusted by Findings of Fact No. 1, is inadequate.⁶⁵ The major disagreement between the parties relates to the responsibility for refilling the cutoff trench and for certain alleged consequential or ripple effects of the mis-staking.

The Government's position is that the difficulties resulting from the mis-staking were substantially complicated and increased because the appellant underbid the work involved in the cutoff trench and then hired M & S, an allegedly underfinanced and incompetent subcontractor to do the work. According to the Government, M & S was unable to pay its bills at the bid price of \$0.24 per cubic yard for removal of material from the cutoff trench. It therefore could not derive sufficient revenue from this work, or from the roadway excavation which was being performed contemporaneously and which the Government maintains was also underbid substantially. When M & S left the job, the work was delayed while Steenberg secured the necessary equipment.

Difficulties with dewatering precipitated the grouting subcontractor into stopping work also. Moreover, contends the Government, the appellant failed to provide adequate

⁶⁵ Appellant asserts "there was no legal basis for Change Order No. 1" (Appellant Posthearing Reply Brief, 19) and that its issuance was "an attempt to frustrate the right of the contractor to terminate operations for breach of contract or its equivalent."

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bypass facilities to carry off the volume of spring runoff that should have been anticipated. Therefore, the Government's position is that the delay to the operation, which concededly amounted nearly to a full loss of the 1964 construction season, resulted from a combination of Government mis-staking and appellant's mishandling.

The Government has maintained that the restaking of the cutoff trench was accomplished pursuant to the authority of Paragraph 51⁶⁶ which authorizes the redimensioning of open cut excavation, including that of the cutoff trench, with payment, at least in the first instance, to be made at unit prices. Paragraph 51 further provides that an equitable adjustment, pursuant to Clause 3 (Changes) of the General Provisions will be made if it should be found that the requirement for redimensioning increased the contractor's cost.

⁶⁶ Paragraph 51 reads in pertinent part:

"a. General.—All open-cut excavation required for the dam and appurtenant works shall be performed in accordance with the provisions of this paragraph and Paragraphs 52 to 54, inclusive. * * * Excavation shall be made to the lines, grades, and dimensions shown on the drawings or established by the contracting officer. During the progress of the work, it may be found necessary or desirable to vary the slopes, grades or the dimensions of the excavations from those specified herein. Any increase or decrease of quantities excavated as a result of such variations will be included in the estimates which shall be subject to the provisions of Paragraph 18. However, if the contracting officer determines that the contractor's costs of performing the work will be increased by reason of such variations an equitable adjustment will be made to cover such increased costs. Otherwise, the work will be paid for at the unit price bid therefor in the schedule regardless of such variations except as may be covered under Paragraph 18."

The appellant disagrees with the Government's characterization and contends that the deeper and wider staking amounted to a change, was the consequence of a changed condition, or was a breach. The appellant asserts that:

By denying the existence of a Change, Changed Condition or breach of contract, the Bureau was able to issue Change Order No. 1 only for *excavation* below the originally staked 28-foot depth, while excluding backfilling, grouting, compacting, or any other items which would be included in a Change, Changed Condition or breach of contract (Appellant Post-hearing Reply Brief, 26).

The first matter confronting us is the nature of the cutoff trench question from the legal standpoint. Was there a change or a changed condition,⁶⁷ or did the Government's course of conduct constitute a breach of contract with respect to which the Board has no jurisdiction?

By letter dated March 18, 1965 (Exhibit No. 147), appellant claimed that changed conditions were encountered in the cutoff trench. The contention made was that the:

* * * work on this phase of the project was most severely affected by a sub-surface differing materially from that

⁶⁷ It has been held that whether factual situations which gave rise to change orders were the result of changed conditions compensable under the changed conditions clause or were merely changes directed by the Government as work progressed is insignificant since the right to additional compensation and time extensions and the applicable principles for computing such adjustments are the same. *Hardeman-Monier-Hutcherson, A Joint Venture*, ASBCA No. 12392 (August 28, 1968), 68-2 BCA par. 7220, at 83,522.

indicated in the contract and one that was sufficient latent that neither the Bureau nor the Contractor anticipated it.

The contracting officer denied the claim in Findings of Fact No. 2 (Exhibit No. 251, par. 36).

Paragraph 53c. provides that the "cutoff trench shall be excavated to sound rock * * *." No indication, however, is given in the specifications of the depth to which the cutoff trench is to be excavated. Instead, 53c. calls for the cutoff trench to "be excavated * * * approximately to the lines and grades shown on the drawings."

The cutoff trench is shown on Drawing No. 526-D-2701 (Exhibit X-3). The cutoff trench is also indicated on the "Maximum Section" portion with a notation showing a 30-foot minimum as the dimension across the bottom. In addition, it shows the cutoff trench extending down to "assumed rock surface."

This maximum section also has a scale which is applicable. There is a notation on the Maximum Section which reads, "Crest El. 6022." In the middle of the dam portion, the notation "190" can be seen with arrows from the crest elevation notation and the line marked "original ground surface." By means of the scale the distance from the crest elevation to the line marked "assumed rock surface" is an additional 60 feet (or a total of 250 feet) which results in an elevation of 5,772. Thus, the "Maximum Section" drawing indicates that a cutoff trench of approximately 60 feet below ground surface should be anticipated.

The contractor has placed much emphasis on Drill Holes 22 and 23 which show bedrock at 27.8 and 28.4 feet below original ground. It did not, however, take into consideration Drill Hole 2 which shows bedrock at a depth of 55 feet, at approximate elevation 5,779. It did not do so because DH 2 is depicted under "Miscellaneous Holes" on Drawing 526-D-2755 instead of being shown, along with DH 22 and 23, on Drawing 526-D-2753. The appellant contends that the failure to place DH 2 on the same drawing with DH 22 and 23 is evidence of some sinister motive on the part of the Government.⁶⁸

On Drawing No. 526-D-2752 (Exhibit X-4) can be seen Drill Holes 22, 23 and 2. Drill Hole 2 is located from 90 to 100 feet upstream of section A-A (23 Tr. 2627). Based upon the scale on Drawing 526-D-2752 Drill Hole 2 is 140 feet from Drill Hole 22 and 155 feet from Drill Hole 23. Under the circumstances Drill Hole 2 may not have received as much attention from the contractor as did Drill Holes 22 and 23, but it should not have been ignored altogether. The appellant therefore should have considered Drill Hole 2 as well as the other drill holes. The appellant should not have relied solely on Drill Holes 22 and 23, which are 190 feet apart.

⁶⁸ According to Mr. Malcolm Logan, head of the Bureau's Engineering Geology Division, the decision not to include Drill Hole 2 on Drawing 526-D-2753 along with Drill Holes 22 and 23 was made because "it was too far away and would be shown under miscellaneous holes." (58 Tr. 6421-22)

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Under Paragraph 53 the contractor is told that it must excavate the cutoff trench to the lines and grades shown on the drawings until sound rock is located. The only drawing showing lines and grades is No. 526-D-2701 (Exhibit X-3). That drawing indicates that excavation downward in accordance with the slopes shown thereon should be anticipated to approximately 5,780 or 5,770 elevation from original ground (about 5,835).

Although some portions of the drawing are slightly inconsistent, yielding some disparity respecting the final elevations involved, they do indicate that a cutoff trench of approximately 60 feet should have been anticipated. The appellant is chargeable with the consequences of disregarding this information, particularly since the specifications provide that the cutoff is to be excavated to the lines and grades shown on this drawing.

In addition, the appellant had available to it the complete logs of borrow and core drilling, pursuant to Paragraph 34 of the specifications.⁶⁹ Mr. Miller testified that he

was aware of the provision, but made no effort to look at the complete logs.⁷⁰ According to Mr. Walsh, he was assured by some anonymous Government employee, possibly Mr. Lasko, that certain cores contained in boxes lying open in the Bureau garage were representative of all the cores (43 Tr. 4870-71). These cores probably included Drill Holes 1, 17, 22, and 23 (21 Tr. 2402-03).

difficulties of making and maintaining the required excavation, and of doing other work affected by the geology at the site of the work.

"Solely for the convenience of bidders, logs as abstracted by the Bureau of Reclamation of the core drilling and subsurface explorations are included in the drawings. The complete logs of all holes are available for examination by bidders at the Bureau of Reclamation Office in Ogden, Utah. Bidders must make their own determinations as to whether the abstracted data properly and adequately reflect the information shown on the complete drill logs, as well as whether the complete logs and the abstracted logs properly and adequately reflect the information shown by the available cores and samples. Bidders may obtain their own samples and perform tests on the soils and rock materials to determine unit weights and evaluate shrinkage and swell factors and other properties which the bidder believes to be significant in arriving at a proper bid.

"In-place moisture and density tests were performed in conjunction with other borrow area subsurface investigations. The locations at which these tests were made are shown on Drawing No. 54 (526-D-2710). Basic factual data obtained in these tests are shown on Drawing No. 65 (526-D-2745). Bidders and the contractor shall be responsible for making the calculations necessary to interpret these basic data.

"Bidders are cautioned that the Government disclaims responsibility for any opinions, conclusions, interpretations, or deductions that may be expressed or implied in any of the information presented or made available to bidders; it being expressly understood that the making of deductions, interpretations, and conclusions from all of the accessible factual information is the bidder's sole responsibility."

⁷⁰ 21 Tr. 2405. The complete logs are designated as Appellant Exhibits C-15, C-16, and C-18.

⁶⁹ "34. Information as to Subsurface Investigations

"All available samples and cores recovered in subsurface investigations may be inspected by bidders at the office of the Bureau of Reclamation in Ogden, Utah.

"The Government does not represent that the available cores and samples show the conditions that will be encountered in performing the work, and the Government represents only that any such cores or samples show conditions encountered at the particular point for which such cores or samples were obtained. Bidders must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the

Mr. Lasko denied that he made any such representation. But even if he had, and we are not of the view that the evidence is sufficient to support such a finding, under Clause 13 (Conditions Affecting the Work) of the General Provisions, the Government expressly:

*** assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

Thus, any such representation is not binding on the Government.⁷¹

There is conflicting testimony by appellant's own witnesses respecting the Government's willingness to make available the boxes of core samples recovered in subsurface investigation. Mr. Miller testified that the Government offered to open such boxes.⁷² Mr. Walsh, on the other

hand, stated that the Government was apparently extremely reluctant to do so.⁷³ But later he modified his previous testimony somewhat.⁷⁴ In view of the overall conflict, we do not regard the appellant's evidence as convincing on this question. Accordingly, we find that the boxes of core samples were also available to the appellant for inspection.

It is well settled that a contractor must examine all data available, especially where its attention has been directed by the contract provisions to materials not contained in the

they were piled. The cores were piled up, oh, if I remember as high as the ceiling, for example, in these boxes, one on top of the other, and the Bureau said, 'Any one you want to look at we will get out for you, we have these laid out that are the ones that people have been wanting to look at, so we will keep them out,' and we examined those, and I don't recall whether we asked them to show us any other core that was in the pile or not."

⁷³ He testified (43 Tr. 4870-71):

"I said, 'You've got all of those boxes and you got those few samples down there? I said, 'Let's go and pull down some of the other boxes and get a look at them,' and Mr. Lasko looked agast and said, 'My God, you'd have to get a crew with coveralls on to mule haul all of that stuff down,' and he said, 'If every contractor asked to do such a thing,' he said, 'this would be an endless task.' He said, 'Those are representative samples of the rock,' and if it's representative it's representative. I'm not going to fight with the man and say, 'Well, they're not representative.'"

⁷⁴ When questioned on cross-examination respecting Mr. Miller's testimony (44 Tr. 4918):

"Q. You don't recall the thing Mr. Miller recalled that the Bureau offered to do this if you wanted it?

"A. Oh, I imagine—I would agree with that.

"If we'd have insisted—I don't think that we'd say, 'Well, now, damn it, we want to see these boxes and we're going to see these boxes. After all, we're American citizens, and we're bidders. We have privileges.' I imagine we could have made a great big stink, and they'd have said, 'All right, we'll get one down for you, or two.' I think you can do anything if you just finally take that approach to it ***."

⁷¹ In *R & R Construction Company, IBCA-413* and *458-9-64* (September 27, 1965), 72 I.D. 385, 65-2 BCA par. 5109, the Board expressly ruled that a prospective bidder who relied upon erroneous assurances given by a subordinate of the contracting officer not authorized to give them, and who as a consequence erroneously failed to include in its bid the cost of performing certain work required by the Invitation for Bids, was not entitled after award to an equitable adjustment of its bid price for performing the work so required, even though not contemplated by its bid. If we found a misrepresentation, the Board would be without jurisdiction to grant relief. *Desert Sun Engineering Corporation, IBCA-470-12-64* (October 25, 1966), 73 I.D. 316, 331, 66-2 BCA par. 5916.

⁷² Mr. Miller stated (21 Tr. 2402):

"* * * There were a number of cores, boxes. The cores were in boxes, and the lids were taken off the top and they were laid out on the floor to look at, the ones that were of primary interest to all of the bidders were pretty well all laid out so that they wouldn't have to be taken out of these piles in which

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specification.⁷⁵ We find that the appellant did not do so. We hold that appellant's site investigation was inadequate to support a changed condition claim.⁷⁶

We are of the view that whether appellant was justified in concluding that the core trench would only be 28 feet deep is at best a close question. The Bureau of Reclamation, however, did assume responsibility for its failure to stake the cutoff trench to its correct depth in the first place, irrespective of its position that the contractor should have anticipated that depth.

Government counsel have indicated that in their opinion certain of the contracting officer's allowances to the appellant with respect to the core trench may have been overly generous, but have not requested the Board to overrule his determinations. Mindful of what the Court of Claims⁷⁷ has characterized as its

"consistent holdings" that "the unappealed findings of a contracting officer constitute a strong presumption or an evidentiary admission of the extent of the government's liability * * * subject to rebuttal," the Board will not disturb the contracting officer's acknowledgments of Government liability.⁷⁸

There is on the Government's part a reluctance to regard Change Order No. 1 as evidencing a change. Rather, the Government appears to contend that Change Order No. 1 represents an allowance under Paragraph 51a., which provides, *inter alia*, for an equitable adjustment to be made under certain circumstances.

Thus, in the Government's view the restaking was but a "necessary or desirable" decision pursuant to 51a. "to vary the slopes, grades or the dimensions of the excavations from those specified herein." The contracting officer thereupon treated the contractor as entitled to an equitable adjustment under the terms of that subparagraph for its increased costs and additional time of performance required resulting from the restaking.

We regard the construction placed upon Paragraph 51a. in this situa-

⁷⁵ *Hunt and Willett, Inc. v. United States*, 168 Ct. Cl. 256 (1964); *Flippin Materials Company v. United States*, 160 Ct. Cl. 357 (1963); *Herman H. Neumann*, ASBCA No. 13074 (October 22, 1969), 69-2 BCA par. 7965.

⁷⁶ *Humphrey Contracting Corporation*, IBCA-555-4-66 and IBCA-579-7-66 (January 24, 1968), 75 I.D. 22, 68-1 BCA par. 6820; *Inter-City Sand & Gravel Co.*, IBCA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215, aff'd on reconsideration (August 27, 1959), 66 I.D. 313, 59-2 BCA par. 2310.

⁷⁷ *Dean Construction Co. v. United States*, 188 Ct. Cl. 62, 74 (1969). See *American Air Filter Company, Inc.*, ASBCA No. 14794 (December 10, 1971), 72-1 BCA par. 9219, at 42,777 ("When the contracting officer settled the claim by supplemental agreement the Government became bound. There is no question of the contracting officer's authority * * * unless the unsound position is taken that he was not authorized to make a poor bargain or to err, as we find on hindsight, in his apparent conclusion that appellant's interpretation was meritorious enough to warrant an equitable adjustment.")

⁷⁸ See *Roy L. Matchett*, IBCA-826-2-70 (February 26, 1971), 71-1 BCA par. 8722; *Republic Electronic Industries Corp.*, ASBCA No. 7994 (September 10, 1963), 1963 BCA par. 3874, at 19,258 ("If the Government seeks to overturn a contracting officer's decision in favor of a contractor, it must be held to the same degree of proof as an appellant who seeks to overturn a decision in favor of the Government. Also, due process requires that an appellant be duly apprised before the hearing * * * of the Government's intention to recede from a contracting officer's previous award.")

tion as strained. Paragraph 51a. does permit the Government to vary the slopes, grades, or dimensions of the excavations when "necessary" or "desirable." The original excavation to 28 feet, the additional steps required when the trench was restaked to 42 feet, and the difficulties encountered in reaching the ultimate depth specified of 60 feet can hardly be said to have resulted from a mere variation. We do not believe that Paragraph 51a. was intended to cover major revisions associated with correcting the erroneous staking of a key feature of the project. We conclude that it is an inappropriate vehicle for the relief granted.

It appears to us that through the issuance of Order for Changes No. 1 the contracting officer confirmed a constructive change which occurred when the appellant was instructed to excavate to 42 feet and then to bedrock after initially excavating to a depth of 28 feet.⁷⁹ The contracting officer stated in the change order that the work:

* * * performed involved excavating to revised grades and slopes in an area previously excavated; thus, accessibility was decreased and the excavation had to be performed by more costly methods than was the case under the originally required excavation.

The contracting officer went on to find that the:

* * * change thus resulted in in-

creased costs for the following items of work in the cutoff trench:

i. Excavation outside the limits of the originally staked cutoff trench. This work will include construction of an access ramp into the cutoff trench area.

ii. Dewatering, including dewatering for a longer period than contemplated and throughout the major portion of the 1963-64 winter season and during a portion of the construction season following in 1964.

iii. Placing a corrugated-metal culvert pipe for handling diversion of stream water as necessary during the winter season.

iv. Miscellaneous material required as a result of work being projected into another construction season.

In Findings of Fact No. 1, the contracting officer rejected any elements of claim relating to the core trench insofar as they were not covered by Change Order No. 1. We now take up these various elements which were set forth in Exhibit No. 178 as well as those items concerning which the appellant was awarded additional compensation.

Dewatering and Stream Diversion

It is clear from Findings of Fact No. 1 that, by virtue of Change Order No. 1, the contracting officer intended to compensate the appellant for all its dewatering costs applicable to the core trench (Exhibit No. 221, par. 34). In its Posthearing Brief (at 126), the Government asserts that the appellant was "paid for every hour of men and equipment time required to dewater and re-excavate the cutoff trench following the restaking effort on September 2, 1963."

⁷⁹ See *Gil-Brown Constructors, Inc.*, IBCA-504-7-65 (November 28, 1966), 66-2 BCA par. 5980; *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234. Conversely, we find that no breach of contract by the Government occurred.

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The appellant contends that the net amount allowed, \$104,471.01,⁸⁰ was inadequate. The contracting officer denied appellant's claim for additional compensation for dewatering on the ground of lack of evidence in support thereof.

The Government now maintains that the contractor's dewatering operation was deficient from the beginning. Department counsel goes so far as to assert that there is substantial doubt regarding the propriety of the contracting officer's allowance and questions the chargeability to the Government of all of the contractor's expenses. However, the Department counsel stopped short of requesting the Board to overrule the contracting officer⁸¹ and so, as we indicated *supra* we will not disturb the allowance made.⁸²

Thus, the question before us is whether the contractor is entitled to additional compensation in connection with dewatering. Analysis of Government Exhibit B-621 (the ad-

missibility of which is discussed *infra*) indicates that according to Government records the appellant sustained a loss of \$26,107.37 with respect to Bid Item 1 (Diversion and care of stream during construction and removal of water from foundations). The appellant has not made clear what it considers to be the amount of the under-allowance for dewatering.

In arriving at the adjustment for dewatering in Change Order 1 and in later commenting thereupon in Findings of Fact No. 1, the contracting officer gave no indication that he considered whether any of appellant's dewatering difficulties were attributable to appellant's manner of performance. If he deducted an amount representing the cost of appellant's inefficiency, it is not shown.

It is clear, however, that a contractor should not be rewarded for his incompetence. The contracting officer acknowledged the Government's general responsibility, but we do not believe that he intended to compensate the appellant for expenses resulting from its own deficiencies.

It was unreasonable of the appellant to anticipate excavation in the dry. Aside from the indications of wetness in Paragraphs 51a. and c., the subsurface investigation data in the valley floor in the vicinity of the cutoff trench show the water level very close to the surface of the ground. Thus, Drill Holes 22 and 23 indicate the water level at less

⁸⁰ Based upon Government costs records only, the contracting officer determined in Change Order No. 1 that appellant's total costs of unwatering from July 29, 1963, to February 28, 1964, and from March 11, 1964, to September 4, 1964, as represented by hourly usage of equipment fully operated and maintained amounted to \$124,471.01. From this sum was deducted \$20,000 which represented appellant's contract price for diversion and which had been paid previously.

⁸¹ "The Government will not specifically request that the Board overrule the contracting officer and reduce the amount previously allowed." (Government Posthearing Brief, 126.)

⁸² See *Koenig Aviation, Inc.*, ABSCA No. 11201 (December 9, 1966), 66-2 BCA par. 6020, at 27,810 ("* * * we are not disposed to refuse recovery * * * in the light of the Government's admission that some amount is due.").

than five feet and Drill Hole 2 shows the water table to be about ten feet below the surface.

We also find that appellant's dewatering and diversion efforts were not free of considerable inefficiency. Appellant's dewatering plan contemplated the need for four wells, but the wells were not installed until November 1963 after the cutoff trench was deepened, widened and excavated to its ultimate depth. Then, through the winter of 1963-64 the contractor chose to fill up the cutoff trench with water rather than maintain its pumping operation.

It also appears that the system designed and installed by the appellant to carry the flow of Lost Creek through the damsite was not wholly adequate. The contractor apparently did not anticipate the probability that the core trench would be flooded during the spring runoff of the creek in 1964. As a result the creek overflowed and ran through the cutoff trench for a considerable period of time. This, in turn, led to delay because it was necessary to pump out the cutoff trench after it had been filled with water and after Lost Creek had been allowed to run through it.

Finally, we are of the view that the diversionary scheme designed and installed to enable passage of the water through the site left something to be desired in that it resulted in the deposit of considerable material in the bottom of the cutoff trench which had to be removed.

In this context we must also consider a question of admissibility of evidence which occurred at the hear-

ing. The Government sought to introduce into evidence answers by Mr. Walsh on behalf of the appellant to interrogatories promulgated in a lawsuit against the appellant by Stang, the initial dewatering sub-subcontractor, arising out of this work.⁸³ In response to the following interrogatory:

34. State in detail how M & S suffered damages in the sum of \$70,000.00. Give details as to what elements go to make up the \$70,000.00, and what is the separate amount of each element.

Mr. Walsh's answer reads:

M & S suffered damages in excess of \$70,000.00. Because of the failure and inadequacy of the plaintiff's dewatering equipment and plan of dewatering, the major portion of the core trench excavation work had to be performed "in the wet" and thereby became slow and inefficient and was not completed in the fall of 1963. As a result, M & S was exposed to the expense of unnecessary winter and spring dewatering, additional overhead and ultimate default of its subcontract. The amount of said damages must be computed by adding labor, material and equipment rental shown by M & S's records or by expert testimony concerning the fair and reasonable cost of doing the work if plaintiff's dewatering had been satisfactory as compared to the cost of doing the work under the conditions experienced.

The Government maintained that the answers to paragraph 34 and the answers to paragraphs 43 and 45 were admissible as judicial contradictions of Mr. Walsh's direct testi-

⁸³ Government Exhibit B-407. The lawsuit is entitled "*United States of America for the Use of John W. Stang Corporation, Plaintiff v. Steenberg Construction Company and The Travelers Indemnity Company of Hartford, Connecticut*," Civil No. C-116-64, U.S.D.C., Utah.

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mony (44 Tr. 4960) here, specifically:

Q. Mr. Walsh, was it your opinion in December of 1964 that the activities of John W. Stang Company had nothing to do with the M & S default?

A. Yes, it had nothing to do with their default. It was the Government's action that caused M & S to go broke and therefore had to abandon the work.

On the appellant's objection, the hearing official ruled that the answers were not admissible as a document and could only be used for "cross-examination or testing the witness's recollection or impeaching his testimony" (44 Tr. 4954-55). Department counsel requested that the document be kept in the record in order to obtain a ruling thereon by the members of the Board participating in this decision (44 Tr. 4960).

We hold that the answers to the interrogatories contained in Government Exhibit B-407 are admissible as judicial admissions against interest by the appellant.⁸⁴ They constitute further evidence that at least a portion of appellant's dewatering difficulties were not solely the responsibility of the Government, but were brought about by inadequacy of equipment and dewatering methods utilized by the Stang Com-

pany, the appellant's sub-subcontractor.

Accordingly, we find that the appellant has been compensated equitably for the problems of dewatering arising out of the mis-staking and deepening of the core trench. A further allowance to the appellant is not warranted.

Backfilling

The contracting officer denied appellant's claim for the added cost of placing fill at the greater depth of the core trench. He took the position that the effect of Change Order No. 1 was to restore the trench to the conditions under which backfilling would have been required if the initial staking had been correct.

The contracting officer's rationale was that, regardless of the initial incorrect staking of the core trench by the Government, the contractor either knew or should have known (by reason of various contract data) that it would be required to refill a trench with Zone 1 material to depths and side slopes substantially as was the actual case after the final excavation lines had been accomplished according to the restaking. As a consequence, he ruled that all requirements of the embankment work, including the backfill of Zone 1 material in the core trench restaked zone, were the same as could have been expected by the contractor at the time of bidding. He therefore denied the appellant's claim for additional compensation for backfill or placing Zone 1 em-

⁸⁴ *Vincent v. Young*, 324 F.2d 266 (10th Cir. 1963); *Community Counselling Service, Inc. v. Reilly*, 317 F.2d 239, 242 (4th Cir. 1963); *Northeastern Real Estate Secur. Corp. v. Goldstein*, 163 F.2d 963 (2d Cir. 1947); *Federal Surety Co. v. City of Staunton, Ill.*, 29 F.2d 9, 14 (5th Cir. 1928), cert. den., 279 U.S. 840 (1928); *Falkinburg v. Inter-State Business Men's Acc. Co.*, 272 N.W. 924, 927 (Neb. 1937); *Mertens v. McMahon*, 66 S.W.2d 127, 136-37 (Mo. 1933).

bankment in the core trench up to original ground surface by reason of the restaking.

The contracting officer, however, recognized that the appellant incurred certain additional costs by reason of excavating the core trench from a depth of 28 feet to 60 feet. The period of dewatering lasted long after the restaking was finished. The restaking affected the excavation only to the extent that the work of excavation to bedrock was prolonged and made more difficult; if the stakes had been set originally for slopes to reach a 60 foot depth they would have covered a wider and more convenient area within which to work.

It was October 1963 when rock was found at 60 feet. The period of dewatering expense that the contracting officer found to be reimbursable lasted until September 1964, when backfilling began. This substantial lapse of time following the end of the restaking changes would seem to negate any real causal connection between the restaking and the increased dewatering costs. Such excavating work as was performed after the contractor reached bedrock was associated with finishing slopes and cleaning, particularly that which was caused by sloughing during the 1963-64 winter season. It cannot be said that such excavation work had even a remote connection with the fact that there were successive stakings in 1963. The same conclusion applies to the allowance of excess costs of dewatering for a year following the

completion of excavation to bedrock.

There is thus an inconsistency in allowing the additional dewatering expense but not allowing the additional backfilling costs. It would seem that if the contractor is to be charged with knowledge before bidding that the cutoff trench would be 60 feet deep, such knowledge is as applicable to excavating as it is to backfilling. If the contractor should have been aware, as the Government maintains, that the trench would reach a depth of 60 feet, it follows that the contractor also should have contemplated the concomitantly greater costs of dewatering for a deeper excavation. As we have demonstrated *supra* the allowance of dewatering costs flows from the change in depth. Accordingly, it would appear that the increased costs of backfilling the trench were as causally related to the increase in depth as were the increased dewatering costs.

For this reason, we are of the view that the contracting officer's allowance to the appellant of its dewatering costs constituted an admission or concession of responsibility on the part of the Government,⁸⁵ appli-

⁸⁵ See *J. D. Hedlin Construction Co., Inc.*, note 7, *supra*, in which the Court said, at 83:

"We turn now to a determination of the extent of the government-caused delays. Our Commissioner has found that the government-caused delays, with respect to the pile difficulties, amounted to 125 days. Defendant challenges this finding by asserting that the delays encountered primarily resulted from plaintiff's job methods. We start with the proposition that defendant, by extending the time of performance 125 days, recognized that the overall project was delayed to that extent. The grant of an extension of time by the

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cable as well to the backfilling of the core trench. The Board considers that the contractor has established by a preponderance of the evidence that the backfilling work was made more difficult⁸⁶ and less efficient and that the contractor is entitled to be compensated additionally therefor.

Compaction

It is difficult, however, to assess the contractor's damages with respect to the quantities involved in the backfill of the core trench with Zone 1 material.⁸⁷ The appellant appears to take the position that ordinary Zone 1 backfill (Item 13) and compaction thereof are to be considered as "Specially compacted earthfill, Zone 1" (Item 14) because of the Government's stringent requirements for hand tamping and high density in the bottom of the core trench.⁸⁸

contracting officer carries with it the administrative determination (admission) that the delays resulted through no fault of the contractor. * * * Cf. *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242, 269 (8th Cir. 1969).

⁸⁶ See *Peter Kiewit Sons' Co.*, note 85, *supra*.

⁸⁷ In Findings of Fact No. 2 (Exhibit No. 251, p. 62), the total volume shown for Item 13 (Earthfill in dam embankment, Zone 1) is 174,089 cubic yards and the total volume shown for Item 14 (specially compacted earthfill, Zone 1) is 2,288 cubic yards. However, on p. 69 of the Findings, the actual or expected final quantity of Item 14 is given as 4,458 cubic yards.

⁸⁸ Additional density requirements increased the volume of Zone 1 material to make a given thickness of compacted fill (39 Tr. 4333). Compaction requires the placing of a greater volume of material to fill a given space than would be necessary without compaction; the higher the degree of density, the greater the required volume of material.

Under Paragraph 64, Zone 1 material placed at steep and irregular embankment foundations is to be specially compacted. The appellant has alleged that the "increased size of the cutoff trench greatly increased the amount of 'specially compacted Zone 1 material.'" (Appellant Prehearing Brief, 34.) And at one time it apparently claimed that virtually all of the Zone 1 backfill placed in the core trench during 1964 should be paid for under Item 14 because of strict requirements for compaction.

The contracting officer found that the Government had made payment for specially compacted Zone 1 under item 14 (Exhibit No. 251, par. 215). The quantity of special compaction included all compacted embankment below elevation 5,780, the Zone 1 along both abutments, and some Zone 1 compacted around irregularities on the upstream and downstream slopes of the core trench. Since the bottom of the core trench was about elevation 5,772, the contracting officer's determination would cover eight feet.

According to the contractor, multiple handling methods were required for about twenty feet (39 Tr. 4337-38). Mr. Angel testified that the appellant placed 44 heaping loads of material amounting to roughly 1,200 cubic yards, in the deepest area of the core trench (39 Tr. 4322-23).

It is not entirely clear, however, that the appellant is now making a claim for special compaction over that allowed by the contracting of-

ficer, except as it claims that virtually all of the backfill should be paid for as special compaction under Item 14 because of excessive requirements in regard to its rolling equipment. In its letter of June 21, 1965 (Exhibit No. 178), only two compaction items are referred to: (1) "no payment for extra compaction work around the pipes left in place for pumping" and (2) "no allowance on extra hand compaction around the perimeter of the core trench."

The two claims relate to three 18-inch-diameter corrugated-metal standpipes installed as part of the dewatering operation and grout riser pipes placed on or about the excavation slopes in overburden in order that the rock drains used in the cutoff trench for dewatering could be filled with grout. When the contractor was unable to compact Zone 1 embankment adjacent to the standpipes and grout riser pipes with the sheepfoot roller, it used pneumatic tampers. The contracting officer denied the claims on the ground that the utilization of special compaction around the standpipes and grout riser pipes was due solely to the contractor's own construction methods and was not directed by the Government (Exhibit No. 251, pars. 214, 216).

We are of the view that the matter of the cost of special compaction of material around the pipes is covered under Paragraph 47, the dewatering provision of the contract, rather than the clauses pertaining

to Zone 1 embankment.⁸⁹ As such, the cost either was included or should have been anticipated and included for payment in appellant's lump-sum price for dewatering in accordance with Subparagraph d. of Paragraph 47.⁹⁰ We hold that the quantity of material compacted by special compaction methods around the pipes should not be included for payment under Item 14.

With respect to the assertion that the Government imposed excessive rolling requirements in order to meet Proctor compaction test densi-

⁸⁹ "47. *Diversion and Care of Stream during Construction and Removal of Water from Foundations*

* * * * *

"c. Removal of water from foundations. * * *

"During the placing and compacting of the embankment material in a cutoff trench, the water level at every point in the cutoff trench shall be maintained below the bottom of the embankment until the compacted embankment in the cutoff trench at that point has reached a depth of 10 feet, after which the water level shall be maintained at least 5 feet below the top of the compacted embankment. When the embankment has been constructed to an elevation which will permit the dewatering systems to maintain the water level at or below the designated elevations, as determined by the contracting officer, the pipe drains including surrounding gravel, shall be filled with grout composed of water and cement or clay."

⁹⁰ "d. Payment.—Payment for diversion and care of the stream during construction and removal of water from foundations will be made at the lump-sum price bid therefor in the schedule. Except as otherwise provided in Paragraph 51, the cost of furnishing all labor, equipment, and materials for constructing cofferdams, dikes, channels, flumes, and other diversion and protective works; removing or leveling such works, where required; diverting the stream; making required closures; maintaining the work free from water as required; grouting drains and sumps; disposing of materials in cofferdams; and all other work required by this paragraph shall be included in the lump-sum price bid in the schedule for diversion and care of stream during construction and removal of water from foundations."

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ties exceeding the specifications, we believe there is sufficient evidence in the record to support such a charge. The Government, moreover, has conceded that "there were discrepancies" in the administration of the density test program by certain Government field personnel (Government Posthearing Brief, 331).

On Government Exhibit B-411, a summary of field and laboratory tests of compacted fill controlled by the Proctor test, there are indicated by a series of single and double asterisks those tests on which rerolling took place. It is clear therefrom that substantial rerolling occurred. However, the number of times the appellant was required to reroll does not appear (54 Tr. 5981).

Whether a power tamp, pneumatic roller or roller compaction was used is denoted for each test under the heading "Method of Compaction." The symbol for roller passes is "12" and that number is shown on the chart whenever roller compaction took place, if there were 12 or more than 12 passes.⁹¹

There is an avenue of relief afforded under Subparagraph g. of Paragraph 63 which provides for an adjustment of 35/100 cent per cubic yard for each additional roller pass

above 12. The appellant has not made a claim pursuant to this provision, but the Board is not precluded from granting relief upon a theory not advanced by the parties if there is some other theory under which recovery may properly be allowed.⁹²

It may be that the appellant did not pursue its remedy under Paragraph 63g. because no exact count was kept of the number of passes required. Where, however, there is substantial evidence in the record showing clear entitlement to a contractor of an adjustment in its favor, the Board may grant relief notwithstanding appellant's inexact recordkeeping. In such case, the appellant well may suffer and be limited in its recovery to a lesser amount than would be reflected by accurate data, but it would be grossly inequitable to deny it all relief solely on the basis of a technicality. This aspect of appellant's claim is therefore allowed. The equitable adjustment to which it is entitled will be taken up *infra*.

Grouting

In Exhibit No. 178 the appellant asserted that Change Order No. 1 provided inadequate compensation to it because no allowance was made therein "for damages suffered on subcontract work which was delayed and disrupted by the change in the core trench." In the same letter the appellant also alleged that

⁹¹ Mr. Wilcox testified (52 Tr. 5797-98):

"Q. Now, I notice going through here that this figure 12 for 12 roller passes is always 12. Could there be any indication on there if there were more than 12 passes?

"A. No.

"Q. You put 12 down there whether there were 12 or 20?

"A. We would put 12 whether there were 12 or 20 unless there were additional roller passes requested, and I know of none that were."

⁹² *Bendix Field Engineering Corporation*, ASBCA No. 10124 (November 8, 1966), 66-2 BCA par. 5959, at 27,570.

the "[a]dded cost of grouting contract due to delay caused by core trench" amounted to \$88,946.29.

The contracting officer concluded in Findings of Fact No. 1 (Exhibit No. 221, par. 28) that the subcontract referred to was that for grouting and so treated the allegations as duplicative.⁹³ He held the claim to be a request for damages due to a Government-caused delay and as such outside the scope of the contract and beyond his administrative authority to entertain or settle.

The Government's position is that the claim should be dismissed since it pertains to extra expense for unchanged work arising out of at least some Government-caused delay. The appellant has denied that the grouting was done exactly as originally planned, since it had to take place at a deeper elevation, "in a less accessible work area under more adverse conditions (including unanticipated water problems)" (Appellant Posthearing Reply Brief, 28).

Mere allegations, however, do not constitute proof, as the Board has said on many occasions,⁹⁴ and we have been unable to find sufficient evidence in the record to support a finding in favor of the appellant that the grouting work was changed by the erroneous staking of the cut-off trench.

On the contrary, it is clear that appellant's installation of the grout

cap and commencement of the grouting operation were in the main⁹⁵ held up by the delay in completing the excavation of the core trench resulting from the improper staking. The thrust of the litigation between the appellant and Prepakt, its grouting subcontractor, over Prepakt's abandonment of the subcontract relates to the delay of Prepakt's schedule almost entirely by reason of the additional excavation and, secondarily, because of faulty dewatering operations.⁹⁶ Further delay occurred when it was necessary to substitute Continental as subcontractor after Prepakt refused to continue.

We therefore find that the appellant is seeking reimbursement for work arising out of a "pure delay" situation. It is well settled that the Board has no jurisdiction in such a case, in the absence of a suspension of work clause.⁹⁷ Accordingly, the claim is dismissed.

⁹³ We find, also, that some portion of the delay is attributable to appellant's dewatering deficiencies.

⁹⁶ See transcript of proceedings (Appellant's Exhibit C-66) of *Steenberg Construction Company v. The Prepakt Concrete Company*, U.S.D.C., Utah, Civil No. 226-64, June 6, 1966, the Findings of Fact and Conclusions of Law made therein (Appellant's Exhibit C-64), and the opinion of the U.S. Court of Appeals, 9th Cir., dated August 3, 1967 (No. 9009), affirming the judgment of the lower court (Appellant's Exhibit C-65). At 41 of the transcript there is testimony that the dewatering system went faulty. At 8 of the opinion, the Court states that "flooding water caused by pump trouble interfered with operations."

⁹⁷ *Allison and Haney, Inc.*, note 9, *supra*; *R. A. Heintz Construction Company*, IBCA-403 (June 30, 1966), 73 I.D. 196, 66-1 BCA par. 5663.

⁹³ We are in accord with that determination.

⁹⁴ *E.g.*, *American Ligurian Co., Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 21, 66-1 BCA par. 5326, at 25,027.

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Equipment

The appellant contends that Change Order No. 1 did not make any allowance for the costs of moving in and out with additional and different equipment because of the changed requirements of excavating at the greater depth (Exhibit No. 178). In addition, the contractor claims additional compensation for "idle time" of rented and corporate equipment allegedly used to perform the additional cutoff trench excavation in the total amount of \$520,235.82.

With respect to the former assertion, the record discloses that only one piece of different equipment was moved to the site specifically for core trench work because of the changed requirements of excavation. That was a 1 $\frac{3}{4}$ -cubic-yard Link Belt dragline, which was rented from Syblon-Reid Construction Company and moved to the site on September 19, 1963. According to the contracting officer, the estimated cost of the dragline was included in the payment allowed by Change Order No. 1 (Exhibit No. 221, par. 29). Thereafter, in Findings of Fact No. 1, the adjustment was modified to cover the actual invoiced cost of renting the dragline instead of the estimated cost. The appellant has not sustained its burden of proof as to its utilization of other equipment or with respect to the amount of the allowance. The claim is therefore denied.

As for the idle equipment claim, Mr. Miller testified that the contractor anticipated that equipment would be shifted from place to place, particularly in connection with the roadway work (13 Tr. 1466). The appellant has not established that the time the equipment was allegedly idle can be charged to any act of the Government. A review of the equipment which the appellant contends was idled, mentioned in its Exhibit C-223, indicates that, except for equipment needed to perform open-cut excavation, all contractor major earthworking equipment was brought on the job in late 1963. Examination of appellant's Exhibit C-224 shows that all of the M & S equipment which was utilized for earthwork left the job in November 1963.

It appears, however, that M & S had other places to work besides the cutoff trench and borrow. All of the road from approximate Station 200 to the end was constructed by Steenberg after M & S left the job.⁹⁸ It would seem that M & S could have done this work while it was on the job. Since other areas of work were available, it is unreasonable to contend that M & S earthwork equipment was idled because of the cutoff trench mis-staking.

Also, according to the contractor's original schedule (Appellant Exhibit C-99), the appellant intended

⁹⁸ The appellant put its earthwork equipment to work on borrow and embankment operations, as well as roadway, in the spring of 1964.

to shut down its operations over the winter of 1963-64, between November 15, 1963 and April 15, 1964. Thus, all expense for equipment ownership charged during this period is allocable to the anticipated winter shutdown.

Moreover, it appears that the contractor lost at least two months of excavation time as a consequence of the delay in completion of the cutoff trench operation due to the dewatering deficiencies which were discussed above. None of this delay is chargeable to the Government. If this time is added to the five months of winter shutdown anticipated in Exhibit C-99, no actual idle time beyond that anticipated was experienced by the contractor.

We therefore hold that the appellant has not established that it incurred any additional expense by reason of equipment kept idle as a result of the cutoff trench mistaking. In addition, the appellant has not sustained its burden of proof concerning the expense of workmen alleged to have been kept idle.

Finally, Subparagraph e. of Paragraph 21 of the Special Conditions is of no avail to the contractor.⁹⁹ It does not appear that the contractor

was precluded by the impracticability of moving from using the idled equipment on other contract work.¹⁰⁰

The claim is denied.

Cleanup

The appellant contends that the cleanup requirements imposed by the Government for grouting and prior to placement of Zone 1 material were excessive. Cleanup is provided for as follows in Subparagraph b. (Preparation of foundations) of Paragraph 63 (Earthfill in Dam Embankment Zone 1):

* * * * *

The foundation, except rock surfaces, for the earthfill shall be prepared by leveling and rolling so that the surface materials of the foundation will be as compact and well bonded with the first layer of the earthfill as specified for the subsequent layers of the earthfill. Surfaces upon or against which the earthfill portions of the dam embankment are to be placed shall be cleaned of all loose and objectionable materials in an approved manner by handwork or other effective means immediately prior to placing the first layer of earthfill. Immediately prior to placing the earthfill, such surfaces shall have all water removed from depressions and shall be properly moistened and sufficiently clean to obtain a suitable bond with the earthfill.

The appellant has not established that the degree of cleanliness imposed by the Government exceeded the provisions of the contract. Accordingly, the claim is denied.

⁹⁹ "21. *Equipment Allowances for Contract Adjustments*

* * * * *

"e. Idle time.—Ownership expense allowance for idle time of equipment actually employed on the extra work will be made on the basis of 50 percent of the first shift rate for each regular working day, if the contracting officer determines that the equipment could be used advantageously on other work under the contract and that such use is precluded by impracticability of moving. * * *

¹⁰⁰ *Cosmo Construction Company, IBCA-468-12-64* (August 3, 1966), 73 I.D. 229, 249, 66-2 BCA par. 5736, at 26,737.

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Stockpiling, Multiple Handling of Materials, Excavation of Material from Slides, Ramping

In Findings of Fact No. 1 (Exhibit No. 221, par. 35), the contracting officer held that all of the contractor's actual costs for stockpiling, multiple handling of materials, excavation of slide material, ramping, and excavation on the sides of the core trench outside of the originally staked lines were included in Change Order No. 1. He denied the claims on this ground and on the additional ground of lack of evidence in support of further compensation.

We uphold the contracting officer's determination. It appears that M & S started to look to other parts of the work for revenue purposes when it began having difficulty meeting its payroll because of the lack of revenue from the cutoff trench (27 Tr. 3043). Consequently, M & S opened up Borrow Area No. 2 and commenced to haul Zone 2 and 3 material therefrom to the dam commencing about August 12, 1963, or before the restaking (Government Exhibit B-572). M & S built up the height of the Zone 2 and 3 fills and dug the ramp to the cutoff trench on the downstream side rather than the upstream side. Accordingly, it would seem that the decision of the appellant to place a substantial portion of the Zone 2 and 3 material ahead of completion of the cutoff trench was not dictated by the cutoff trench mis-staking.

In this connection, it must be noted that the appellant had to put

down the downstream Zone 2 blanket, a layer of Zone 2 material of several feet, before any Zone 3 could be placed. This requirement for a Zone 2 blanket meant that any open cut excavation removed prior to the time that the blanket was completed would have to be stockpiled. Since the appellant's original schedule (Appellant Exhibit C-99) contemplated the commencement of open cut excavation before the start of cutoff trench excavation, it is apparent that some stockpiling of material would have to occur. Moreover, both Paragraphs 51 and 61 indicate that some stockpiling and double handling of material would be required.

We therefore find that a considerable amount of stockpiling and multiple handling was the result of appellant's own operations and cannot entirely be attributed to the cutoff trench mis-staking. This does not mean that we regard the allowance to the contractor for stockpiling and multiple handling as erroneous. On the contrary such an assertion has not been made; furthermore, it is beyond question that the contractor was required to perform some stockpiling and double handling as a direct consequence of the deepening of the trench, as the contracting officer recognized. We simply hold that the appellant has not established its entitlement to additional compensation for stockpiling and multiple handling beyond that already allowed by the contracting officer.

The appellant has also not furnished us with additional evidence on which to base further compensation to it for its claims for (a) deep excavation of material from slides in the core trench due to water action over the winter, (b) ramping to get material out at the greater depth and because of the necessity of stockpiling incidental to excavating at the greater depth, and (c) the extra cost of excavation on the sides of the core trench beyond the original slope lines above the 28-foot elevation. In Findings of Fact No. 1, the contracting officer held that these costs were included in the compensation allowed by Change Order No. 1 and disallowed further payment (pars. 35-36). The appellant has not met its burden of showing that the allowance was inadequate.

The claims are therefore denied.

Interest

The appellant's claim for interest due resulting from the Bureau's failure to process the change order for the core trench, or to make proper progress payments was denied by the contracting officer on the ground that it was a claim for damages which he was without authority to consider (Exhibit No. 221, par. 37).

There is insufficient evidence in the record to establish that the expense claimed is for interest which appellant may have incurred on money borrowed to perform the

change.¹⁰¹ There is also a lack of clear and convincing proof that the interest was incurred, in the absence of evidence of a specific loan, as a result of general business borrowings and dealings with its bank occasioned by the change.¹⁰² It may well be that financial reverses sustained by the appellant on this job occurred in large measure as a consequence of its extremely low bid. In such a case business borrowings are as attributable to under-financing as they might be to the core trench change.

In our view, the interest claim is simply in the nature of a charge for the Government's failure to pay a sum of money when due. It is well settled that the Board has no authority to allow such a claim.¹⁰³ The claim is therefore dismissed.

Cost to Process and Six Months Added Overhead

The first of these claims is for the alleged costs of uncovering and preparing costs and claims due to Bureau changes and errors. The second is for "six months added overhead." The contracting officer denied both

¹⁰¹ See *Joseph Bell v. United States*, 186 Ct. Cl. 189 (1969).

¹⁰² See *Sun Electric Corporation*, ASBCA No. 13031 (June 30, 1970), 70-2 BCA par. 8371.

¹⁰³ *Franklin W. Peters and Associates*, IBCA-762-1-69 (December 23, 1970), 77 I.D. 213, 245, 71-1 BCA par. 8615, at 40,038; *Keco Industries, Inc.*, ASBCA Nos. 15061, 15131 (January 20, 1971), 71-1 BCA par. 8698. We note the recent ruling by the Comptroller General permitting the Government to agree contractually to pay interest on claims that are not promptly settled by the Government. 51 Comp. Gen. 251 (B-174001, October 27, 1971).

on the ground that they are claims for damages which he had no authority to consider (Exhibit No. 221, par. 37). In addition, he held that the six months added overhead claim was duplicative of other requests for overhead contained in appellant's claim (Exhibit No. 178).

With respect to the latter, it is based on "six months added supervision." Supervision is an item of overhead. We note that Change Order No. 1, as adjusted by Findings of Fact No. 1, made a 15 percent allowance to the appellant for overhead and profit in connection with the cutoff trench claim (par. 43). Accordingly, the claim is denied.

As for the appellant's claim for "costs to date spent on uncovering and preparing costs and claims due to Bureau changes and errors," the items claimed include attorneys' fees, travel expense to Washington, Denver, and Ogden, and compensation to various of appellant's employees such as Messrs. Steenberg, Walsh, Doak, Angel, and Midtown Corp.¹⁰⁴ They are considered costs of claims preparation and presentation which are not allowable as direct costs under a claim pursuant to the Changes article of a fixed price contract.¹⁰⁵

¹⁰⁴ Midtown, Corp. was the employer of Mr. Charles P. Curd, who had been in charge of a Government survey party at Lost Creek. Mr. Curd left Bureau employ as a result of a reduction in force and was employed by Midtown on September 1, 1964. He thereafter became an employee of the appellant on July 1, 1967 (15 Tr. 1636-37).

¹⁰⁵ *Koenig Aviation, Inc.*, note 82, *supra*; *Power Equipment Corp.*, ASBCA No. 5904 (January 10, 1964), 1964 BCA par. 4025. See *Frigitemp Corporation*, VACAB No. 646 (December 27, 1967), 68-1 BCA par. 6766.

Time Extensions

The appellant alleges that the core trench excavation was completed on November 2, 1963, and not October 9, 1963, as found by the contracting officer in Change Order No. 1. It therefore contends that an additional time extension of 24 days should be allowed in this connection. It also claims that it is entitled to a further time extension of 33 days for backfilling the cutoff trench.

In Findings of Fact No. 1, the contracting officer held that the core trench excavation was substantially complete on October 9, 1963. According to Appellant Exhibit C-8, p. 7, rock was encountered at elevation 5,775 feet on October 9, 1963, which bears out the contracting officer's finding. The request for an extension of 24 days is therefore denied.

The contracting officer denied the time extension request of 33 additional days for backfilling on the ground that the appellant's monetary claim for backfilling was without merit (Exhibit No. 221, par. 39). In view of our determination, however, that the Government was responsible for appellant's additional costs of backfilling due to the core trench re-staking, it is clear that the appellant is entitled to an extension of time for this work.

The appellant arrived at the figure of 33 days by taking $\frac{2}{3}$ (the estimate of increased backfill material) of the additional seven weeks required to bring the fill to original

ground (Exhibit No. 178, Exhibit XIII attached thereto). The figure was based on a work week of seven days. We believe a work week of six days is more accurate. Accordingly, the appellant is granted a time extension of 28 days.

BORROW

The appellant contends that the difficulties created by the Bureau regarding the core trench affected adversely its "movement out of borrow and placement in dam embankment" (Appellant Posthearing Brief, 156). Its borrow plan was allegedly predicated upon a 28-foot core trench depth (Appellant Posthearing Brief, 159). The appellant also maintains that the Government represented that there was sufficient borrow in Borrow Area No. 2 to complete the project. It suggests that the subsurface investigation data contained in the specifications were inaccurate and inadequate (Exhibit No. 198). It charges that the Government unfairly failed to provide it with the Government Design Considerations booklet (Appellant Exhibit C-20), containing a breakdown by types and quantities of material in each of the various borrow areas, for bidding purposes (51 Tr. 5622-24).

Therefore, according to the appellant, by virtue of "the various actions of the Bureau" it was "impossible for the Contractor to plan or implement any coherent sequence of excavation of the different zones from the various borrow areas." There was, as a result, allegedly un-

necessary expense and delay in performance, and the costs and time required for earthwork were supposedly "drastically increased." The appellant also alleges that the Government quantity computations are not correct. Finally, the contractor maintains that the Government failed to relocate utility lines out of borrow areas.

The Government, on the other hand, claims that the appellant did not manage its borrow operations so that it could build the dam with a minimum of waste or utilize the materials from the borrow areas in an orderly and economic fashion (Government Posthearing Brief, 300). It denies the existence of any causal effect between the mis-staking of the cutoff trench and appellant's difficulties with the borrow (Government Posthearing Brief, 161).

The applicable specification is Paragraph 59.¹⁰⁶ According to the

¹⁰⁶ In pertinent part it reads as follows:

"59. *Borrow Areas*

"a. General.—All materials required for the following construction which are not available from excavations required for permanent construction under these specifications, shall be obtained from Borrow Areas No. 1, 2, and 4 shown on Drawing No. 54 (526-D-2710).

"(1) Construction of dam embankment Zones 1, 2, and 3.

"(2) Specially compacted earthfill, Zone 1.

"(3) Specially compacted sand, gravel, and cobbles, Zone 2.

"(4) Pervious backfill.

"(5) Bedding for riprap.

"In general, clay, silt, sand, and gravel materials classified in accordance with the Unified Soil Classification System as clays and silts will be considered suitable for and shall be selected for use in Zone 1 of dam embankment. In portions of the borrow areas, Zone 1 materials may be obtained from a first cut after stripping, but in other portions of the borrow areas the Zone 1 material may be overlain by Zone 2 or 3 materials. In

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Government, "the principal provisions" of Paragraph 59 are these:

(i) Materials necessary to build the dam that are not available from the required excavations are to be taken from Borrow Areas 1, 2 and 4. (ii) Zone 1 material may be overlain by Zones 2 and 3 material and conversely with respect to Zone 2 material. (iii) Cobbles and boulders (including some suitable for riprap)

general, sand, gravel, and cobble materials classified in accordance with the Unified Soil Classification System as sands, gravels, or sands and gravels, will be considered suitable for and shall be selected for use in Zone 2 of the dam embankment. In portions of the borrow areas, Zone 2 material may be obtained from a first cut after stripping, but in other portions of the borrow areas suitable Zone 2 materials may be overlain by Zone 1 or by Zone 3 material. Zone 3 material may consist essentially of Zone 2-type material or may consist of miscellaneous mixtures of clay and silt with Zone 2 materials, which mixtures are considered unsuitable for use in either Zone 1 or 2 of the dam embankment.

"Hard, dense, and durable cobbles and boulders which are removed from stripping in borrow pits or are separated from otherwise suitable Zones 1, 2, and 3 materials may be placed in riprap.

"The contractor's operations in the borrow areas shall be subject to the approval of the contracting officer and shall be such as will produce the proper proportions of Zones 1, 2, and 3 materials to meet the requirements of these specifications.

"The location of borrow pits within borrow areas shall be approved by the contracting officer. The Government reserves the right to change the limits or location of borrow pits within the limits of the borrow areas in order to obtain the most suitable materials for the various zones, to minimize stripping, to maintain the production of a proper proportion of the various materials, or for other reasons. The contracting officer will designate the depths of cut for the various materials in all parts of the borrow pits, and the cuts shall be made to such designated depths. * * *

"Exploratory holes in the borrow area indicate that the materials are variable in texture and contain some variable amounts of oversize cobbles and boulders. Approximate percentages of these oversize materials encountered in the exploratory holes within the borrow area are

will be found in the material in the borrow. (iv) Zone 1 material in borrow pits is to be irrigated commencing at least 30 days prior to anticipated use. (v) Operations of the contractor are subject to approval and must be such as to produce proper proportions of Zones 1, 2 and 3 materials; the contractor has the affirmative duty to develop a plan to do so. (vi) The Government

shown on the logs. Some of the logs note cobbles and boulders scattered on the surface of the borrow area. The absence of percentages of oversize on any log of exploratory holes within the area or the absence of a note regarding surface cobbles and boulders does not, however, imply that oversize materials will not be encountered in the vicinity of such exploratory holes either on the surface or with depth. Bidders are cautioned that wide variation from the nature and texture of materials and the percentages of oversize material as indicated by the test holes is to be anticipated. Bidders must assume all responsibility for deductions and conclusions concerning the nature and texture of material, percentages of oversize material, the total yield of oversize material, and the difficulties of making excavations, of removing the oversize materials from the excavated materials, and of obtaining a uniform mixture of materials. Some exploratory test pits in the borrow areas will be open for inspection and bidders should inspect the borrow areas and examine the test pits, and bidders are urged to sample and test material from borrow areas prior to submitting bids.

"The contractor shall be entitled to no additional allowance above the unit prices bid in the schedule on account of the designation by the contracting officer of the various portions of the borrow areas from which materials are to be obtained; on account of the depths of cut which are required to be made, on account of the quantity of oversize material to be removed from the various materials; or on account of the difficulty of making excavations and of removing oversize from otherwise suitable materials.

* * * * *

"c. Moisture and drainage.—The moisture content of the materials prior to and during compaction shall be in accordance with the applicable provisions for compacting the materials in Zone 1, 2, or 3 of dam embankment. As far as practicable, the earthfill Zone 1 material shall be conditioned in the borrow

may designate limits or locations of borrow pits in the borrow areas listed in order to obtain the most suitable materials, maintain proper proportions of materials or for other reasons. The Government may also designate the depths of cut in the borrow pits. (vii) A wide variation in the nature and texture of materials and the percentages of oversize materials to be found in the material is to be anticipated. (viii) Some test pits are open. Bidders should visit the site and sample the material. (ix) The contractor is to be given no extra allowance above

pits before excavation. If required, moisture shall be introduced into the borrow pits for the earthfill Zone 1 material by irrigation, at least 30 days in advance of excavation operations. When moisture is introduced into the borrow pits for earthfill Zone 1 material prior to excavation, care shall be exercised to moisten the material uniformly, avoiding both excessive runoff and accumulation of water in depressions. If at any location in the borrow pits for earthfill Zone 1 material, before or during excavation operations, there is excessive moisture, as determined by the contracting officer, steps shall be taken to reduce the moisture by selective excavation to secure the drier materials; by excavating and placing in temporary stockpiles material containing excess moisture; by excavating drainage ditches; by allowing adequate additional time for curing or drying; or by any other approved means. Borrow pits for sand, gravel, and cobble fill Zone 2 material and for miscellaneous clay, silt, sand, gravel and cobble fill Zone 3 material will not require preconditioning by irrigation. Moisture as required shall be added to these materials on the embankment.

"The contractor shall be entitled to no additional allowance above the unit prices bid in the schedule on account of the requirement for stockpiling and rehandling excavated materials which have been deposited temporarily in stockpiles; delays or increased costs due to stockpiling; poor trafficability on the borrow area, the haul roads, or the embankment; reduced efficiency of the equipment the contractor elects to use; or on account of any other operations or difficulties caused by overly wet materials.

* * * * *

"No direct payment will be made for irrigation or for any other operations necessary

the unit price bid on account of Government designation of depth of cut, designation of portions of pits to be worked and so on (Government Posthearing Brief, 305-06).

During the 1963 construction season, the appellant essentially limited its borrow activities to Borrow Area 2, although in August it performed a relatively small amount of work in Borrow Area 4, which consisted of clearing sagebrush. Prior to the excavation of the cutoff trench to the 28-foot depth in 1963,

to condition the material properly, and the entire cost of such irrigation, addition of moisture, excavation of drainage ditches, or other operations, shall be included in the unit price per cubic yard bid in the schedule for excavation in borrow areas and transportation to dam embankment.

"d. Stripping and waste.—Borrow-pit sites shall be cleared as provided in Paragraph 48. Borrow pits will be designated by the contracting officer as the work progresses, and stripping operations shall be limited only to designated borrow pits. The contractor shall carefully strip the sites of designated borrow pits of topsoil, sod, loam, and other matter which is unsuitable for the purposes for which the borrow pit is to be excavated, including oversize cobbles and boulders on the surface of Zone 1 materials and oversize boulders on the surface of Zones 2 and 3 materials. The contractor shall maintain the stripped surfaces free of vegetation until excavation operations in the borrow pit are completed and the contractor shall be entitled to no additional allowance above the unit prices bid in the schedule because of this requirement. Materials from stripping shall be disposed of in exhausted borrow pits, or in approved areas adjacent to borrow pits, or as provided in Paragraph 61 except that cobbles and boulders suitable for riprap as determined by the contracting officer may be placed in riprap. If materials unsuitable or not required for permanent construction purposes are found in any borrow pit, such materials shall be left in place or excavated and wasted, as directed. Where excavation of such materials is directed, payment for such excavation and disposal of unsuitable or excess materials will be made at the unit price per cubic yard bid in the schedule for such excavation and transportation to dam embankment."

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the appellant informed the Government of its plan to open first Borrow Area No. 2 to obtain both Zones 1 and 2 material. The Government authorized appellant to proceed in Borrow Area 2 downstream with the transportation of Zone 2 material for placement in dam embankment upstream and downstream from the trench.¹⁰⁷ At the same time, in 1963, the appellant had commenced irrigation of Zone 1 material in Borrow Area 2 in contemplation of being able to commence the backfilling of the trench. Thereafter, in the fall of 1963, the downstream Zone 2 pad was completed so that Zone 2 material being excavated from the deepened cutoff trench could be placed thereon, while some Zone 2 material excavated from the trench was in turn placed in upstream embankment.

Zone 1 material excavated from Borrow Area 2 had to be placed in Zone 3 embankment downstream allegedly because the cutoff trench was being deepened and could not receive any Zone 1 backfill. A substantial amount of unplanned stockpiling also resulted, according to the appellant.

The Government, however, contends that placement of the downstream Zone 2 and Zone 3 material was dictated by the need to facili-

tate the appellant's schedule rather than being the result of the cutoff trench deepening (Government Posthearing Brief, 157). Its position is that the material being removed from the open cut excavation at the upstream and downstream portals of the tunnel and from the spillway was suitable for Zone 3 placement and the appellant desired to avoid stockpiling and double handling. As a consequence, the Government asserts, the appellant followed the obvious course of installing the Zone 2 blanket so that the open cut material could be excavated, loaded, transported and placed in the Zone 3 embankment without intermediate handling.

During June and July 1964 the Government put down additional test pits and power auger holes in each of the three designated borrow areas to provide additional information needed for computation of quantities for materials distribution.

By the fall of 1964, the cutoff trench reexcavation and open cut material had been placed in embankment or stockpiled. Backfill of the cutoff trench with Zone 1 material commenced on September 5, 1964. It was transported from Borrow Area 2 and placed in a difficult manner in the deepened cutoff trench, according to Mr. Angel (39 Tr. 4334). By September 16 the appellant was irrigating Zone 1 material in Borrow Area 4 upstream. At the same time the Government allegedly had moved the contractor into Borrow Area 1, also upstream, and required the appellant to com-

¹⁰⁷ According to the Government it was recognized at that time that all of the Zone 1 material required could not be obtained or was not available from Borrow Area 2 and no representations were made by the Government to the appellant that sufficient quantities of impervious material for Zone 1 would be available from this source or any other single borrow area (Exhibit No. 251, par. 194).

mence stripping that borrow area (Appellant Exhibit C-246, p. 694).

On September 24, 1964, Mr. Wilcox and Mr. Angel visited the Zone 1 section of Borrow Area 2 and Mr. Wilcox warned that there might be an insufficient quantity of properly irrigated material (Appellant Exhibit C-246, p. 712). Mr. Wilcox repeated the warning to Mr. Doak on September 30, 1964 (Appellant Exhibit C-246, p. 724).

According to the appellant, at this time it was under pressure from the Bureau to complete the backfill of the deepened core trench by resorting to excavation in new borrow areas. Mr. Angel requested an extension of the Zone 1 in Borrow Area 2, but Mr. Wilcox did not grant the request because the borrow operation would then extend beyond the original cross-sections (Appellant Exhibit C-246, p. 726).

On October 7, the contractor began hauling Zone 1 backfill from Borrow Area 4 located upstream (Appellant Exhibit C-243, pp. 91-2). Considerable watering of Borrow Areas 1 and 4 was required (39 Tr. 4351).

While Zone 1 material was being placed in the cutoff trench, the appellant became concerned about the impervious material in Borrow Area 4 becoming too dry for placement in the dam embankment. According to the contracting officer, this concern developed because there had been insufficient irrigation in the borrow areas to insure an adequate supply of properly moistened

material to complete the construction season (Exhibit 251, par. 204). The logs in the specifications were reviewed with the contractor on October 13, 1964, to see if any of them showed an adequate amount of natural moisture in the Zone 1 deposits to permit their use.

Thereafter, the appellant dug three test pits at the upper end of Borrow Area 1 with a dozer to check the moisture content in the area. These test pits showed this material lacked an adequate amount of natural moisture and was too dry for use. According to the contracting officer, the Government drilled eleven additional power auger holes at the upper end of the borrow area on November 7, 1964, because of the contractor's interest in the Zone 1 material in the upper reaches of Borrow Area 1, in an effort to determine the moisture content of the Zone 1 material (Exhibit No. 251, par. 204). The contracting officer conceded that this additional subsoil information was not immediately relayed to the appellant and stated that the appellant failed to show a further interest in developing this area.

Meanwhile, by letter dated October 22, 1964 (Exhibit No. 94), the contractor advised that due to the necessity of developing Borrow Area No. 4 and excavating Zone 1 material there, it was necessary to revise Drawing No. 526-412-5664 which shows the plan and profile of a road to be constructed through the southeasterly edge of Borrow

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Area 4.¹⁰⁸ A change order was requested to cover the revision.

The Government replied on November 10, 1964 (Exhibit No. 99) that the road location shown on the drawing may not be final and pointed out that under Paragraph 59b. final location of the road through Borrow Area No. 4 could not be determined until all approved operations had been completed in this portion of the borrow.

In the meantime, on November 2, 1964 (Exhibit No. 97), the appellant advised that due to an insufficient amount of Zone 1 material available in Borrow Area 2, it had to irrigate and develop Borrow Area 4, an operation which had not been anticipated. The contractor asserted that it was entitled to an adjustment for the added cost of irrigation and the development of access roads to remove the required Zone 1 material from the new borrow source for the following reasons.

First, the contracting officer allegedly represented to the contractor that sufficient material, particularly Zone 1, existed in Borrow Area

No. 2. It is said that this representation was made notwithstanding the fact that this borrow area was the least desirable and deprived appellant of its choice of a more suitable source of borrow. Second, this alleged representation as to sufficiency of the material in Borrow Area 2 was presumed by the contractor to be accurate.

By letter dated November 24, 1964 (Exhibit No. 101), the Government denied that it had directed appellant's operations in the borrow areas and had represented that there were sufficient quantities of material available from Borrow Area 2.¹⁰⁹

On December 15, 1964 (Exhibit No. 107), the contractor requested that the limits of Borrow Areas 2 and 4 be extended. According to Mr. Walsh, such extensions would have provided the appellant with a considerable amount of Zone 1 material and would thus have facilitated its operations. The Government on January 8, 1965 (Exhibit No. 118), requested the contractor to show on Drawing No. 526-D-2710 the boundary limits of the extended areas it proposed using so that the Government would be able to determine if there would be any conflicts with present or future work. The drawings were returned by the appellant on January 19, 1965 (Exhibit No. 121).

¹⁰⁸ The Appellant has suggested that the use of Borrow Area No. 2 for the upstream Zone 2 fill placed prior to refill of the cutoff trench to stream level about October 22, 1964, resulted in additional expense because the material had to be transported across the entire damsite and then some distance up into position. We note, however, that the upstream Zone 2 fill in question is located immediately adjacent to Borrow Area 4. Mr. Angel admitted that all or a portion of this Zone 2 material was obtainable from Borrow Area 4 if the contractor had constructed a stream crossing across Lost Creek such as eventually was constructed (41 Tr. 4577; Government Exhibits B-396 and B-397).

¹⁰⁹ To prevent future shortages of material which might delay its earthwork the following summer, the appellant was urged to give careful attention to its irrigation operation in the borrow areas.

The Government advised the appellant on April 20, 1965 (Exhibit No. 157) that its plan to extend the limits of the borrow area had been reviewed. It stated that the Government did not object if appellant obtained Zone 1 material beyond the limits of Borrow Areas 2 and 4 provided that operations in the extended portions of those areas be conducted in accordance with Paragraph 59 of the specifications, and also that the Zone 1 material obtained from the extensions of those borrow areas be paid for at the unit price per cubic yard in the schedule for Bid Item 11 and that appellant's operations in such extensions would result in no additional cost to the Government.

The appellant was also advised that Government exploration of the extended areas indicated that a very limited amount of suitable Zone 1 material was available there for its use.¹¹⁰ It was pointed out that the specifications contemplated that the appellant would have to obtain materials from all three borrow areas in order to have sufficient quantities of material to complete the dam embankment. Specifically, appellant's attention was directed to Para-

graph 59a. which requires that its operations be conducted in such a manner as will produce the proper proportions of Zones 1, 2 and 3 material.

The Government's letter of April 20 also advised appellant that Zone 1 material is available from first cut after stripping in portions of the borrow areas, as pointed out in Paragraph 59 and the logs of exploration holes. In other portions, the Zone 1 material is overlain by Zones 2 and 3 materials. The contractor was told that removal of Zones 2 and 3 material from portions of Borrow Area No. 1 was necessary so that Zone 1 material would be available without the necessity of stockpiling or wasting other borrow area materials.

The contractor was also urged to develop a comprehensive plan of borrow operation without delay in order to maintain the production of a proper proportion of the various materials needed throughout construction. The plan, according to the Government's letter, was to include detailed consideration of borrow irrigation so that materials from various locations would be ready for use in the embankment. Included with the letter was a borrow utilization plan which had been prepared by the Government.

The appellant advised on April 23, 1965 (Exhibit No. 158), that it was studying the Government-furnished borrow area borings and utilization plan and would notify Mr. Klingensmith when the review was completed. On June 7, 1965, the contractor's Zone 1 excava-

¹¹⁰ During February 1965 the Government performed explorations in the requested extensions of Borrow Areas 2 and 4 with a posthole auger. The terrain and winter weather conditions made the use of a power auger impractical. Appellant dug test pits in May 1965 with a tractor with backhoe and loader attachments in Borrow Area 4 and extensions thereof. All exploratory work performed in 1965 was for the purpose of determining the location, extent and moisture content of Zone 1 material. The contracting officer found a very close correlation between the results of the explorations by the Bureau and appellant (Exhibit No. 251, par. 203).

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tion (from the various borrow areas) and placement thereof in dam embankment resumed (Appellant Exhibit C-244, p. 53). The appellant devoted two shifts a day to the Zone 1 embankment operation from the last week of July until immediately before operations ceased in mid-September (52 Tr. 5768). According to the contractor, however, it was not able to achieve a level embankment across which operations could be conducted as originally planned, due to the adverse effects of the core trench deepening and reexcavation (Appellant Posthearing Brief, 166). Mr. Angel testified that the operation was made particularly difficult by the great difference in height between the Zone 3 embankment and the lower Zone 1.¹¹¹

On June 30, 1965 (Exhibit No. 185) the Government told appellant that observation of its construction procedures indicated that Zone 1 borrow area irrigation was not proceeding with sufficient effort to assure an adequate supply of suitably processed material to maintain a minimum Zone 1 embankment construction program.

On July 21, 1965, Mr. Klingensmith was informed that a geologist employed by the contractor had determined that it would probably not be necessary to remove any Zone 1 material from Borrow Area 1 and that sufficient Zone 1 material was available in Borrow Areas 2 and 4 and the approved extensions thereof. On August 5, 1965 (Exhibit No.

194) the appellant requested the logs compiled by the Bureau from the auger tests made in November 1964. These were sent on August 30, 1965 (Exhibit No. 202).

In the meantime, by letter dated August 12, 1965 (Exhibit No. 198), the appellant summarized its contentions with respect to borrow area operations. First, appellant asserted that a nonapproved method of subsoil exploration was used in Borrow Area No. 4 and in the extensions of Borrow Areas 2 and 4. It cites the Bureau's earth manual as indicating that auger pits are not recommended for exploration in materials of the type to be encountered in these borrow areas.¹¹² It also charges that based upon the contractor's actual operations and testing, the Government's auger pit data are unreliable and misleading.

Next, the appellant alleged that some subsoil exploration data of the Bureau's relating to the upper reaches of Borrow Area 1 had not been supplied to the contractor. This presumably refers to the November 1964 data which, as we have seen *supra* were requested by the appellant on August 5, 1965.

Third, the appellant contended that power lines which the contract allegedly represented were to be relocated out of the borrow area were still in Borrow Areas 2 and 4 when notice to proceed was issued. According to the Government the

¹¹² The Government has acknowledged that its method of subsurface investigation here was not in accordance with the manual, but maintains that the appellant was not prejudiced thereby (Posthearing Brief, 308-09).

¹¹¹ 39 Tr. 4351. See Appellant Exhibit C-185.

appellant was not harmed, however, because excavation of material from Borrow Area 2 was begun by the appellant in the early part of August 1963 (Appellant Exhibit C-254, p. 3). The Utah Power and Light Company, owner of the transmission line, completed relocation on August 19, 1963 (Exhibit No. 251, par. 207).

Appellant's fourth contention respecting borrow was that the survey of original ground in the borrow areas was not completed prior to commencement of work and when finally undertaken was "incomplete, interpolated and erroneous." As a consequence, appellant asserts it was "severely prejudiced * * * in measurement of pay quantities * * *."

The fifth allegation relates to the Bureau's directions regarding borrow which are said "to have been a patchwork of piecemeal orders * * *." In this regard, the appellant claims that its excavating subcontractor, M & S, was directed into Borrow Area 2 in August 1963 "because that was the only borrow area available." At that time, according to the appellant, it was assured that "plenty of Zone 1 material was available in Borrow Area No. 2." And so, it is said, on this basis irrigation was completed in September 1963 and the irrigation equipment was moved out. Then in the late summer of 1964, when actual operations disclosed that there would not be enough Zone 1 in Borrow Area 2, the contractor maintains it was directed to irrigate in Borrow Area

1 and also irrigated in Borrow Area 4.

Next, appellant asserted that as a result of the foregoing, particularly the "problems presented by inadequate, incomplete, unsuitable and erroneous soil exploration and survey," it was concerned about the reliability of the quantity computations used in determining the amounts and locations of the three zones of material for purposes of borrow utilization in Borrow Areas 2 and 4 and extensions thereof.

The appellant concluded its letter of August 12 by questioning the desirability of incurring the expense of irrigation and other work in Borrow Area 1.¹¹³ Rather, it suggested that Borrow Areas 2 and 4 be utilized first and that a new borrow area be designated which would permit a shorter haul at a higher elevation near the dam and would reduce the time for completion of the work.

In addition to the assertions contained in its letter of August 12, appellant made the following allegations of erroneous survey and subsurface testing in its Prehearing Brief, at 57-8. First, the charge is made that on Drawing 526-D-2717, where logs of exploration are shown for Borrow Area 4, the plotting of

¹¹³ In response to Government Interrogatory 106, the contractor stated, through Mr. Walsh, that use of Borrow Area No. 1 was not anticipated. The Government's position is that the contractor did not want to utilize Borrow Area 1 because its distance would require a longer haul and would increase its costs (Government Posthearing Brief, 311-12). The Government points to appellant's low bid price of \$0.22 per cubic yard for Bid Item 11, consisting of 1,900,000 cubic yards, some 445,000 cubic yards of which appellant expected to come from Borrow Area No. 1.

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Auger Pit 34 (AP 34) of Section 5-5 at elevation 6058.4 produced a material core projecting more than eight feet above the profile contour of original ground. Further, on Drawing 526-D-2715, Test Pit 75 (TP 75) of Section 2-2 for Borrow Area 2 shows a core sample projecting more than a foot above the elevation of original ground.

The second assertion is that auger pit testing in extensions of both Borrow Area No. 2 and Borrow Area No. 4 showed very little suitable Zone 1 material. However, appellant claims that later test pit operations conducted by it in the proposed borrow extensions revealed substantial additional areas of Zone 1 material.

The final allegation is that large portions of Borrow Areas 2 and 4 were stripped by the contractor prior to original ground survey by the Bureau. The appellant concedes that these missing cross sections in Borrow Areas 2 and 4 were extended by interpolation, but charges that the contracting officer arbitrarily deducted 40,000 cubic yards of borrow quantities which had been earned and certified on prior estimates.

In Findings of Fact No. 2 (Exhibit No. 251) the contracting officer considered the various assertions made by the appellant. He denied for lack of evidence the allegations regarding inadequate or erroneous explorations and surveying by the Government (pars. 202, 209). He found that the contractor had not furnished any information

substantiating its claim that its borrow operations were affected by the presence of the power transmission lines (par. 207).

The contracting officer also found that the Bureau never represented nor implied to the contractor that sufficient amounts of material would be found in any one borrow area to complete the embankment work (pars. 210, 212). He held that Government-prepared borrow area utilization plans were given to the contractor strictly for what use it cared to make of them (par. 212).

In conclusion, the contracting officer held that there was no evidence of any kind to support a claim that the Government caused the contractor to suffer additional expense and delay in the borrow operation and work on the dam embankment (par. 212). He further found that the appellant's claim for additional compensation for developing Borrow Area No. 4 to obtain additional quantities of Zone 1 material was without merit (par. 212).

Decision

Turning first to that portion of the contractor's borrow claim that is said to be a ripple effect of its cutoff trench claim, the mis-staking of the cutoff trench is alleged to have affected adversely the appellant's movement out of borrow, particularly as it relates to Zones 2 and 3 material.

It appears to us from our review of the entire record that the appellant commenced borrow operations

in 1963 in order to place the downstream Zone 2 blanket on the foundation and to enable Zone 3 material to be placed. In this connection, it is relevant to note that the material being removed from the open cut excavation at the upstream and downstream portals of the tunnel and from the spillway was suitable for Zone 3 placement. Since it is desirable where possible to avoid stockpiling and double handling, the prudent course to follow was to install the Zone 2 blanket obtained from Borrow Area 2, thereby enabling the open cut material to be excavated, loaded, transported and placed in the Zone 3 embankment without intermediate handling. We, therefore, find that the placement of the Zone 2 and Zone 3 downstream from the cutoff trench was not a consequence of the cutoff trench staking, but was dictated by the desirability of facilitating the appellant's progress.

As for the borrow that was used to produce the upstream Zone 2, it was necessary that the material be transported through the damsite from Borrow Area 2 because the contractor elected to exploit Borrow Area 2 in the initial stages of work. It appears, however, that large quantities of Zone 2 material were available in Borrow Area 4, which was considerably closer to this portion of the dam. To have hauled the upstream Zone 2 material from Borrow Area 4, all that the appellant need have done was to install a stream crossing across Lost Creek in much the same manner as was

ultimately put in for the purpose of hauling material from Borrow Area 4 to the dam. We regard it as incumbent upon a party to mitigate expenses wherever possible. Having failed to do so, appellant is precluded from further consideration of this particular aspect of its claim.

The appellant has not established that it utilized the borrow areas differently than it would have had the mis-staking of the cutoff trench not occurred. There has been no showing that the requirements for placing the material as set forth in the specifications were altered. Downstream Zones 2 and 3 were placed in the same manner that they would have been had the cutoff trench not been mis-staked, from the same locations in the borrow pit and over the same routes of haul as the appellant had originally planned.

With respect to the remainder of the borrow claim, the appellant appears to be taking the position that the Bureau was responsible for planning and organizing an economical program for developing the borrow areas. It has implied that it was the Government who should have determined the areas to be stripped, irrigated and excavated in order to meet the demand for embankment material.

As we view Paragraph 59, however, there was an affirmative obligation on the part of the appellant to perform its operations in the borrow areas in a manner that would produce the proper proportions of Zones 1, 2 and 3 materials needed to

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meet the embankment requirements. It was the appellant's responsibility to prepare a borrow utilization plan directed towards the elimination of excess irrigation and handling of Zones 2 and 3 materials. This was vital because sufficient quantities of the various types of materials had to be obtained from several borrow areas. Under Paragraph 59 the plan had to be submitted for the approval of the contracting officer. Since such a plan was not submitted prior to the beginning of operations in the borrow areas, the Government, in conjunction with the appellant's earthwork superintendent, devised a workable and reasonably economical plan for developing the borrow areas.

The contracting officer has acknowledged that on several occasions Government representatives did direct the contractor's operations within the borrow areas so as to avoid as much as possible the need for conditioning Zone 1 material on the dam embankment (Exhibit No. 251, par 210). We regard such actions as within the Government's authority under Paragraph 59.

According to Paragraph 59c. the contractor was required to irrigate its borrow areas, commencing at least 30 days in advance of anticipated use. When Government field representatives were of the opinion that the appellant was not complying with this provision, and would therefore run out of properly irrigated Zone 1 material within 30 days, they so advised the contrac-

tor.¹¹⁴ This did not constitute improper action on the part of the Government.

Similarly, the appellant has implied that by verbal directions the Government forced the contractor out of Borrow Area No. 2 into Borrow Area No. 4.¹¹⁵ Under Paragraph 59 the Government had the authority to direct the location of borrow pits within the available areas. Therefore, if the Government made a reasonable determination that further excavation from the pit areas in Borrow Area 2 was not warranted and directed the contractor to utilize another pit in Borrow Area 4, the Government was acting within its contractual rights.

We do not, however, find that any such direction did occur. We note, also, that in its pre-bid estimate the appellant anticipated that the majority of the dam would be built out of material from Borrow Area No. 4.¹¹⁶ Under the circumstances we are unable to find a basis for any compensable change even if there were sufficient evidence to support a finding that a direction of this nature was given.

The assertion by the appellant in Exhibit No. 97 that the Government

¹¹⁴ Mr. Angel has testified that the contractor never had any problem with lack of moisture in borrow material (39 Tr. 4351). There are, however, references in the Steenberg job diary to lack of irrigation in borrow (Appellant Exhibit C-104, pp. 370, 409 and 411).

¹¹⁵ We note in this context that in Exhibit No. 97 the contractor characterized Borrow Area No. 2 as the least desirable area and complained that the Government had directed its use.

¹¹⁶ Appellant Exhibit C-191; Exhibit X-12; 13 Tr. 1451; 26 Tr. 3014.

directed it to go to Borrow Area 2 and represented that sufficient quantities of Zone 1 material were present there is also not supported by the record. Examination of appellant's estimate made at the prebid stage (Appellant Exhibit C-191) and its borrow operation plan (Exhibit X-12) indicates that the use of approximately 55,000 cubic yards of Zone 1 material from Borrow Area No. 2 was anticipated. Both of these exhibits show clearly that the contractor expected to excavate Zone 1 material from Borrow Areas 2 and 4.

As for the alleged Government representation that sufficient Zone 1 material was available in Borrow Area No. 2, there is no evidence in the record clearly identifying the source of the statement. Even if the making of such a representation could be substantiated, however, the appellant was not harmed. Appellant's Exhibit C-191 and Exhibit X-12 indicate that some 55,000 cubic yards of Zone 1 would be used out of Borrow Area 2, but X-12 suggests that the contractor expected that at least 615,000 cubic yards of Zone 1 material would be needed in all. The appellant therefore anticipated that Borrow Area 2 alone was not an adequate source of all of the Zone 1 material.

The evidence also does not support appellant's assertion that the use of Borrow Area No. 1 was not anticipated. On the contrary, according to its bid estimate (Appellant Exhibit C-191), appellant contemplated that 445,000 cubic yards of material would emanate

from that area with respect to Bid Item 11 (Excavation in borrow areas and transportation to dam embankment), or slightly less than one-quarter of the estimated total quantity of 1,900,000 cubic yards.

With respect to the appellant's assertion that the Government used a method of subsurface investigation not approved by the Bureau's earth manual, the appellant has not established that it was prejudiced thereby. In February 1965 explorations were performed in the proposed extensions of Borrow Areas 2 and 4 that appellant requested (Appellant Exhibit C-254, p. 1). The appellant had made pre-bid estimates of the material and its sources and its request was not made contingent upon the results of the explorations. The appellant had given no indication to the Government that such bid estimates were based upon inadequate investigation or testing, if this was the case. It is true that the inadequate Government exploration in this instance may not have penetrated to the full depth of the Zone 1 material available in Borrow Area 4, but the appellant was able to extract a sufficient quantity of Zone 1 out of the more accessible Borrow Area 2.

Next we consider the contractor's concern regarding the reliability of quantity computations used in determining the amounts and locations of the three zones of material for borrow utilization. It contends that it was harmed by the Government's failure to provide it with the design considerations booklet (Appellant Exhibit C-20). According to that

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document, the item of borrow estimated in the bidding schedule, consisting of 1,900,000 cubic yards, was made up of the following: stripping, 51,870 cubic yards; Zone 1, 702,100 cubic yards; Zone 2, 768,100 cubic yards; Zone 3, 372,030 cubic yards; and an insignificant amount for other purposes.

Testimony by Government designers, Messrs. Fred Davis and Walker, indicated that they had estimated that approximately 2,900,000 cubic yards, or about $1\frac{1}{2}$ times the amount necessary to build the dam, were available in the three pits (51 Tr. 5624; 55 Tr. 6108). This amount was computed as follows:

	Borrow area 1	Borrow area 2	Borrow area 4
Zone 1 and stripping-----	932, 000	17, 000	472, 000
Zone 2-----	840, 000	184, 000	455, 000
Total-----	1, 772, 000	201, 000	927, 000

According to Appellant's Exhibit C-191 and Exhibit X-12, the con-

tractor's comparable estimates are as follows:

	Borrow area 1	Borrow area 2	Borrow area 4
Zone 1-----	¹¹⁷ 445, 500	55, 000	560, 000
Zone 2-----		335, 000	500, 000
Total-----		390, 000	1, 060, 000

¹¹⁷ The figure was not broken down into zones. In Appellant Exhibit C-191, there are two figures (195,000 and 250,000) which appear to represent material for two different zones, but Mr. Miller could not identify them (26 Tr. 3023).

Examination of both sets of figures shows that in connection with Borrow Area 4, the estimates are quite close. There are, however, very substantial differences with respect to Borrow Areas 1 and 2.

In both instances the marked variations reflect the use of a different elevation for estimating. On Exhibit X-12, the center of mass of the material the contractor expected to excavate from Borrow Area 2 is shown as at elevation 5,905. This is a low figure for the center of mass elevation, where the two lowest test pits, TP-13 and TP-14, only go

down to elevation 5,914, since it is nine feet below the lowest exploration. The contractor's estimate thus was apparently based on a theory that the average elevation of the material would be nine feet below the lowest figure shown on the Government exploration data (26 Tr. 3028). As a consequence, the appellant overestimated in reference to Borrow Area 2 and underestimated in connection with Borrow Area 1.¹¹⁸

¹¹⁸ The underestimate in connection with Borrow Area 1 was particularly fortunate because of the distance of haul involved in using Borrow Area 1.

Except for this circumstance, based upon its Exhibits C-124, C-191 and X-12, it would appear that the appellant was using the same general method of estimating employed by the Government in Appellant Exhibit C-20 and would have arrived at reasonably similar estimates. We therefore are unable to conclude that the appellant was prejudiced by the Government's failure to make C-20 available, particularly as there has been no showing that the contractor requested and was refused examination thereof, or that the Government was aware that the appellant could not reasonably have arrived at such estimates.

The appellant has also not established how it was prejudiced by Drawing 526-D-2717 (Logs of Explorations for Borrow Area No. 4), in which AP 34 is depicted as being above original ground by eight feet. On the drawing AP 34 is clearly depicted as a projected hole. Examination of Drawing 526-D-2710 (Location of Explorations for Borrow Areas and Rock Source) shows that AP 32 and TP 25 are on a line, with AP 34 off the line but close to it (53 Tr. 5833). The logs for AP 32 and TP 25 are shown on 526-D-2717 along with that for AP 34. According to Mr. Walker, AP 34 was projected along the line on Drawing 526-D-2717 in order to provide additional information, since it was expected that "the conditions at AP-34 would presume to prevail to some extent along that section" (53 Tr. 5933).

Mr. Miller testified that he understood that the word "projected" meant that the hole was drawn at a different location (22 Tr. 2502). He also stated that he regarded AP 34 as a "sampling operation" (22 Tr. 2496). He admitted that he did not "remember ever at that bidding time going over to auger pit 34" (21 Tr. 2406). On cross examination he testified that AP 34 caused him no concern.¹¹⁹

The appellant has also not substantiated its contention that its borrow operation was prejudiced by the failure to relocate the power lines timely.¹²⁰ As for the assertion that the Government survey was not complete as to original ground before operations began, which is said to have prejudiced the contractor by denying proper payment, the appellant has failed to sustain its burden of proof.¹²¹ Mr. Lasko testified that original ground was obtained as to the entire Borrow Area No. 2 prior to any operations except several small areas into which the contractor moved without notice to the Government in violation of Paragraph 19. Mr. Robert Moore (who was in charge of design and contract administration at the Bureau's Ogden office) described the area where the interpolation from topo-

¹¹⁹ "MR. LITTLE: * * * Did that pit cause you any concern at all, the way it's shown there?"

"THE WITNESS: I don't think it would because I would only use it as a point to plot on graph paper * * *," (21 Tr. 2408).

¹²⁰ See Appellant Exhibit C-254.

¹²¹ The allegation of underpayment with respect to borrow is considered *infra* in the discussion of the Termination for Default and appellant's justification for stopping work.

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graphic maps was done (75 Tr. 8339). None of this evidence has been refuted.

The claim is denied.

THE ROADWAY

The roadwork appellant was called upon to perform under Paragraph 2 of the Special Conditions of the contract consisted of "construction of earthwork and culverts for approximately six miles of county and private road relocation and [of] 0.5 mile of recreational area access roads" and of a "concrete slab boat ramp approximately 700 feet long." Item 64 of the bidding schedule, as amended by Supplemental Notice No. 1, dated May 21, 1963, called for 136,000 cubic yards of roadway excavation. Item 65 provided for 10,000 cubic yards of boat ramp excavation. Item 67 called for 250 mile cubic yards of overhaul, which is defined in Subparagraph a. of Paragraph 145 as "a cubic yard of excavated material hauled 1 mile in excess of the free-haul limit."¹²²

The roadway to be relocated was a road approximately 31,000 feet long which followed the bottom of the valley through the dams site and

turned off at the junction of Francis Creek and Lost Creek. Part of the road was under the jurisdiction of Morgan County; the remainder which went upstream along Lost Creek was privately owned to serve cattle and sheep farmers in the area. Relocation was intended to avoid inundation of the roadway. The relocated roadway, as originally planned, extended from Station 10+00 along the right abutment to and across the crest elevation of the dam, whence it proceeded in ascending station numbers toward Francis Creek (crossing at about Station 135), whereupon it became the private roadway and extended across to the opposite ridge and eventually resumed a course parallel to Lost Creek, ending at Station 326 (1 Tr. 39-46). Several proposed access roads extended from the relocated roadway to a planned recreation area, boat ramp and camping area. The county portion of the road was to be twenty feet wide, the private portion sixteen.

The appellant's position is succinctly summarized at 170-71 of its Posthearing Brief, as follows:

1. In bidding the roadway it relied upon data furnished in the plans and specifications (together with site observations) which indicated a simple, side-cast bulldozed roadway to be constructed essentially on a half-cut and half-fill basis with minimum handling of material.

2. Unknown to it, the Bureau (prior to issuance of the plans and specifications) had taken complete

¹²² Paragraph 145 a, set the "limit of free haul" at 1,000 feet. The remainder of the provision states:

"* * * Payment for overhaul of excavation for roadway will be made only for excavated materials required for roadway embankments and for refill of excavation below finished grade or for roadway excavation materials required to be wasted beyond the limit of free haul. The entire cost of hauling the above-described materials any distance up to the free-haul limit from the original position shall be included in the unit price bid in the schedule for excavation for roadway."

cross-sections of the planned roadway and had prepared a mass-haul diagram which showed the location and quantities of excavation, fill and waste and the precise relationship between excavation and fill within any given distances, including balance points.¹²³ All of this was withheld from the bidding contractor by the Government. The Government thereby failed to disclose that the actually intended roadway was substantially full-cut and of a greater width than shown on the plans and specifications.

3. After the contract was awarded, the Bureau "surreptitiously" upgraded the roadway even further beyond the roadway embodied in the cross-section and mass-haul data withheld, by widening curves and altering alignment. The effect of these changes was to move the roadway further into the hill, causing even more substantial cuts and fills and increased handling of material to a greater extent than otherwise would have been required. The contractor had to perform most of this changed work without having been advised of the changes by the Bureau.

4. The roadway which the Government ultimately required it to build was in all respects, including width, more substantial in nature and more difficult to construct than the roadway indicated at the time of bidding. The difficulties in construction were compounded by the

improper manner in which the Bureau staked the roadway side slopes in areas of rock.¹²⁴

The effect upon its operations of the Bureau's conduct and allegedly inadequate and misleading plans and specifications were set forth in the appellant's claim letter of September 9, 1964 (Exhibit No. 44). There were changed quantities, increased rock excavation, deeper cuts than anticipated and substantial overhaul. Taking the position that the roadway work was not that on which it bid, the appellant requested payment for roadway excavation on an "as built" basis and an additional unspecified sum for "unanticipated and unforeseeable extra rock excavation." Although the claim has been reiterated subsequently on a number of occasions, the only monetary value appellant has placed on the adjustment sought is that it is equivalent to 10-15 percent of its overall claim.¹²⁵ The appellant has also not requested an extension of time with respect to the roadway work for a specific period, but it is clear that one is sought (Exhibit No. 147, p. 3).

¹²⁴ As asserted by appellant, the plans and specifications called for the staking of back slopes in rock at 1/4:1 and in fractured rock at 1/2:1, as distinguished from 1:1 in common material. Contrary to these provisions, the Bureau allegedly staked extensive reaches of rock at uniform 1:1 back slopes and required the appellant to perform the excavation without the proper staking.

¹²⁵ Exhibit No. 147, p. 6. The claim was also referred to in Exhibit Nos. 62, 88, and 219. In Appellant Exhibit C-225, the total roadway claim is shown as \$101,531. The total amount of the roadway claim shown on Appellant Exhibit C-225 (revised) is \$72,740.

¹²³ A balance point is a point where the excavation and embankment quantities would balance (7 Tr. 752).

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The Plans and Specifications

In support of its contention that the plans and specifications did not indicate "the more substantial type of roadway which the Bureau actually intended to build (as evidenced by design data which was withheld from the contractor)," the appellant points to the alleged inadequacy of the various contract drawings pertaining to road relocation and the access roads. The road relocation drawings are numbered 526-412-5663 through -5673 and 526-D-2751. The former show the proposed centerline plan and profile; the latter, typical sections. The access roads drawings are identified as 526-412-5779 through -5781 and show the centerline plan and profile thereof.

According to the appellant, the plans were deficient because they did not contain original ground cross-sections at various intervals along the proposed centerline and because they did not contain a mass-haul diagram with balance points shown thereon (13 Tr. 1407).¹²⁶ It alleges that without balance points the balance between cut and fill quantities cannot be determined,

and without cross-sections cut and fill quantities cannot be computed (Appellant Prehearing Brief, 37). Inasmuch as the typical sections consisted generally of half-cut, half-fill, the appellant assumed that the road would be a half-cut, half-fill road (13 Tr. 1413; 23 Tr. 2561). It was, moreover, allegedly informed by Mr. Lasko that the road would be a "bulldozed pioneer type" and "not a first-class highway" (13 Tr. 1396).

In the course of preparing the roadway design, the Bureau (1) compiled complete cross-sections taken through the entire length of the roadway, (2) plotted cross-section prisms showing specific relationships between cut and fill, and (3) designated stations where rock cuts were anticipated and at which 1/4:1 and 1/2:1 side slopes were planned (Appellant Exhibit C-137). It used the cross-sections to prepare a relocated roadway mass-haul diagram which showed the planned distribution of cut and fill quantities. Appellant claims that through the use of the mass-haul diagram it would have been possible for it to divide the planned relocated roadway into points which would have shown the volume of excavation needed to make required fill within balances. Mr. Woods testified on cross-examination that there was sufficient time in preparing the project to assist bidders by plotting on the roadway alignment the cross-sections that were withheld (7 Tr. 755-56).

¹²⁶ In addition, the appellant has contended that it was misled by Drawings 526-D-2700 and -2710 with respect to the location of the relocated road between station 150+00 and 218+00 (Exhibit No. 219, p. 34; Appellant Prehearing Brief, 36). These drawings allegedly indicate that the road there was to be on or near the top of a plateau. The issue was not raised again at the hearing or in the appellant's Posthearing Brief. The appellant has not met its burden of proof with respect to this assertion. This aspect of the claim is denied.

Upgrading and Field Revisions

After the contract was awarded, the Government revised drawings 526-412-5663, -5664, and -5665.¹²⁷ The revisions essentially consisted of flattening curves by lengthening the radii of horizontal curves and easing the alignment. The revised drawings were transmitted to the appellant on September 12, 1963 (Appellant Exhibit C-40). It appears that all such revisions were staked prior to the commencement of construction operations thereunder by the contractor.

The appellant is claiming extra costs as a result of field revisions of alignment and grade also made by the Government after award of the contract. The modifications allegedly effected the redesign of the upper recreation road, the road leading to the boat ramp and the upper camping area road, and the drainage of certain culverts (Appellant Prehearing Brief, 41).

As a consequence of these changes, appellant contends the roadway was required to be moved into the hillside some eleven feet, causing greater depths and widths of cut and increasing the amount of rock which it had to excavate. The revisions also allegedly required the appellant to construct fills for which it was not compensated since the

contract provided payment for material moved from excavation only.

However, the Government's position is that the appellant was not compelled to excavate more material, including rock, than originally required. To the contrary, the Government contends that the revisions actually made excavation less difficult for the appellant.

The Contracting Officer's Findings

In Findings of Fact No. 2, the contracting officer considered the various claims pertaining to the roadway work. He found that (1) the presence of rock did not constitute a changed condition (pars. 64-71); (2) the Government represented to the contractor neither that the road was only a pioneer type nor that cuts and fills would be balanced (pars. 72-77); (3) revision of the drawings did not create compensable additional work (including unanticipated rock cut) and no extension of time was allowable (pars. 78-88); (4) certain field revisions made during construction which allegedly caused substantially changed quantities, additional rock excavation, significant field changes, cuts far in excess of what could be reasonably anticipated, and substantial overhaul, were in fact agreed to in advance and paid for except where minor in scope (pars. 89-95); (5) allegations that changes to road alignment and grade in the field produced additional quantities and increased rock excavation were not

¹²⁷ Drawing 526-412-5673 was also revised to add an 18"X60' corrugated-metal pipe at Station 313+11. Appellant's authorized representative verbally agreed to furnish and install it at bid prices and payment therefor was subsequently made.

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only without validity but actually the changes made excavation less difficult for the contractor (pars. 96-104); (6) the acts of the Government in making changes did not cause the contractor to excavate more rock than contemplated or to build more fill than expected; additional compensation and an extension of time therefor were, accordingly, unnecessary (pars. 105-108); (7) excessive fills were not required as a result of changes made by the Government, since the contractor was put on notice by the specification that fills would be widened with excess excavation in areas of substantial cut and also, the contractor overexcavated through carelessness (pars. 109-115); (8) the appellant has been compensated in full for overhaul of materials in excess of the free haul distance prescribed by Paragraph 145 of the specifications (pars. 116-120); (9) the contractor was not caused to build fills in excess of those required by the contract; the cost of constructing such fills, except for extra haul, should have been included in the unit price bid for excavation for the roadway; the cost of all extra haul necessary in construction of the fills should have been included in the contract bid price for overhaul (par. 121); (10) revisions of drawings and field revisions were not of a nature or magnitude as to constitute changes under the contract entitling the contractor to an adjust-

ment in the contract price and time, except as provided in Change Order No. 3 for work in connection with the parking area.¹²⁸

Decision

The appellant claims that rock was encountered which was unanticipated and unforeseeable. It alleges that by virtue of design changes it was compelled to perform heavy rock cuts that changed the character of the excavation.

First, the appellant maintains that its bid price for Item 64, Roadway excavation,¹²⁹ was based on the understanding that the material to be excavated fell within the definition of common excavation under Paragraph 50b. and thus excluded rock. However, Item 64 clearly indicated that the roadway excavation would be of an unclassified type. Consequently, a prudent bidder would not have assumed that all material to be excavated would consist of the common, non-rock variety.

On the contrary, the appellant should have anticipated the pres-

¹²⁸ Under Change Order No. 3 (Exhibit No. 4), appellant was allowed the lump sum of \$2,637.33 for "[e]xtra hauling of materials from boat ramp excavation to, and placing and grading these materials for construction of, a parking area, turnback area and wide shoulder on the right side of the boat ramp, all uphill from Station 3+00," as directed by the contracting officer. The areas are designated on Drawing No. 526-412-5781.

¹²⁹ Steenberg's bid on this item was \$0.15, while the Government engineers' estimate was \$0.80 and the average price of the other bidders was \$0.81. At the request of the Government (Appellant Exhibit C-59) the appellant confirmed its bid relating to Item 64, *inter alia* (Appellant Exhibit C-60).

ence of rock. The specifications are replete with references to the existence of rock.¹³⁰ Some 134 test pits consisting of bulldozer cuts were established along the line of the road relocation and were available for inspection at the time of bidding. The results thereof are set forth in the logs of exploration (Drawings 526-D-2756 through 2760). Approximately twenty of them indicate that rock excavation was to be expected.¹³¹

As it turned out, however, little rock was actually encountered. According to Mr. Arnold Babb, who made a special investigation of the project for the Government, "less than 400 linear feet of cut section shows material that could be classed as rock in the entire 31,000 feet of road" (Exhibit No. 220, pp. 26-27). Moreover, Bureau records indicate that the entire road was constructed by bulldozer, scrapers, and rippers and no heavy equipment in the form of power shovels was required. Blasting was used only on four sections (Station 82+00 to 86+00, Station 92+00 to 93+00, Station 119+50 to 123+50, and Station 194+50 to 195+00), constituting approxi-

mately 3 percent of the total roadway length (Exhibit 251, par. 107).

Examination of the profile view of the roadway (Drawings 526-412-5663 through 5673) reveals numerous sections of cuts and fills on centerline. Consideration of the plan and profile drawings along the path of the roadway would have indicated design cuts at centerline up to 20 feet and design fills at centerline up to 25 feet.¹³² It would seem, also, that a mere reading of the caption of Paragraph 145 (Overhaul of Excavation for Roadway) would serve as a warning that for its entire length a balanced half-cut, half-fill road should not have been anticipated.¹³³ The amount of overhaul beyond the free distance indicates that the road was at least to some extent not balanced.

¹³² *E.g.*, Drawing 526-412-5666 shows the roadway from Station 115 to Station 125 as full cut with cuts ranging from 7 feet to 15 feet at centerline. Mr. Miller testified (22 Tr. 2520-1) that at the time of bidding it was possible to inspect virtually the entire centerline location of the proposed relocated roadway to Station 200+00, the only exception being the several indentations in the topography where the road was designed to be built on complete fill and the centerline and bulldozer trail would not exist at the time of bidding.

¹³³ According to Mr. Miller, the contractor did consider Bid Item 67 covering payment for overhaul beyond the free haul distance of 1,000 feet (13 Tr. 1414-15). On cross-examination, Mr. Miller stated as follows (22 Tr. 2529-30):

"Q. Mr. Miller, did you recognize that you potentially could have perhaps as many as 13,000 yards that you might have to overhaul someplace outside the thousand foot limit on this project?

"A. I did not.

"Q. You didn't think that was indicated to you by that 250-mile cubic yard quantity?

"A. No, I didn't give it any consideration like that."

¹³⁰ See, *e.g.*, Paragraphs 139 b. (in rock excavation the bottom shall in all cases be taken out to six inches below finished grade), 142 c. (constructing embankments formed of rock materials), and 150 a. (riprap material for the roadway may be obtained from required excavation for the roadway, provided the rock is suitable for riprap).

¹³¹ *E.g.*, the presence of (1) limestone is shown in connection with dozer cuts T43 and T45; (2) siltstone is shown in connection with dozer cuts T52, T69 and T71; and (3) sandstone is shown in connection with dozer cuts T74, T82, T119, T127 and T131.

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We do not regard as significant the Government's alleged withholding of the mass-haul diagrams prepared by the Bureau showing the location and quantities of excavation, fill and waste. Mr. Miller did not inquire as to the availability of mass-haul diagrams (23 Tr. 2536). When questioned on cross-examination if the contractor had asked about the lack of cross-sections, he stated (23 Tr. 2536):

No * * * It didn't appear that it was that much import to have them. * * * [T]he conclusion I arrived at was that it was not important because it was going to be of such an easy nature to perform * * *.

According to Mr. Harold A. Linke, Jr., a consulting engineer who was the Government's expert witness in connection with this claim, had appellant referred, at the time of its pre-bid site investigation, to the plan and profile drawings in the specifications, which show the amount of cut or fill designed for the particular station at centerline, the appellant could have anticipated the nature of the construction at that point. However, Mr. Miller stated that at that time the appellant would not have been interested in stations (23 Tr. 2536).

From Mr. Miller's response it would appear that the appellant planned to make a more complete site investigation at some future time. Since the contractor did not go over the entire length of the roadway during the tour (13 Tr. 1402), a second inspection should have been made. The appellant, however, made

no subsequent effort to return to the site for a more thorough inspection (13 Tr. 1402). Appellant assumed that the type of road contemplated "didn't require [a] tremendous amount of investigation * * *." (23 Tr. 2555). Careful examination of the contractual data should have indicated to the appellant that such an assumption was unwarranted.

It also appears that by making a simple computation prior to the bidding the appellant could have concluded that the road was designed to be more substantial than it anticipated. This entailed dividing the estimated quantity for roadway excavation by the number of linear feet in the length of road designed. The result was an average of 118 cubic feet of material, which means that an average of 118 cubic feet of material would have to be excavated for every linear foot of roadway (26 Tr. 2918-19).

Appellant's reliance on so-called "typical" sections was misplaced. The only drawings which show typical sections with cut and fill approximately balancing near centerline are those for the boat ramp access road (No. 526-412-5781) and for the access road to the middle camping area (No. 526-412-5780). It appears from appellant's claims brochure (Exhibit No. 219) that the appellant considered those sections to be typical of the private road.

The appellant's interpretation of a typical section, however, is not in accordance with the common engineering concept of a typical section drawing. Appellant seems to con-

tend that a typical section drawing is intended to portray the dimensions and side slopes to be used in all of the various circumstances which may be expected to be encountered along a road. According to accepted engineering practice, a typical cross section shows the conditions of construction required in the event of total cut, total fill, or a combination of both, but does not purport to show any specific relationship between the amounts of cut and fill to be expected at any location.

Appellant also has sought to make much of the revision of Drawings 526-412-5663, -5664, -5665 and -5673 after the contract was awarded. The revisions consisted in the main of an increase in radii of horizontal curves.¹³⁴ The revised sections total about 4,400 feet, or about 14 percent of the entire road.¹³⁵

It seems that the length of radii for some of the horizontal and vertical curves was increased after the Government learned that a number of the curves specified for the relocated road would be unsafe for the operation of semi-trailer trucks which were used for the transport of livestock on the existing county road. The contracting officer found that the revisions were staked prior to any construction (Exhibit No.

251, par. 80). The record does not refute his findings. As a consequence, we conclude that the appellant's roadway operations were not affected by the drawing revisions.

Although the revised drawings were transmitted to the appellant on September 12, 1963, the first written protest by which appellant contended that they constituted a major redesign is dated September 9, 1964. The lapse of one year is regarded as significant and reflects on the substantive validity of the claim.¹³⁶

The appellant further contends that it is entitled to contract price adjustments and an extension of time by reason of the field changes in the roadway made during the course of construction. According to the appellant, the redesign and field changes by the Government's resident engineer with respect to road alignment and grade resulted in increased quantities and additional rock excavation (Exhibit No. 44). Our review of the record reveals no support for such assertions.

We regard the changes to be of the type that should have been expected by the appellant in preparing its bid. It is clearly provided under Paragraph 139 (Excavation for Roadway) that:

* * * the undetermined character of the materials which will form the embankment, slopes and roadbed or other factors, may make it necessary or desirable during the progress of the work to vary the width of the roadbed or the

¹³⁴ The conditions that existed before revision are depicted on the drawing designated as Exhibit 231 through 234. Exhibit Nos. 231 through 234 are found in Exhibit No. 251.

¹³⁵ Exhibit No. 220, p. 26. The design change, based on neatlines, increased the volume of cut by 4,306 cubic yards, or about 3 percent (*Id.*).

¹³⁶ See *Futurronics, Inc.*, DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7079, at 32,759, *aff'd.* on reconsideration (September 3, 1968), 68-2 BCA par. 7235.

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slopes, alignment, or grades, and the dimensions dependent thereon.¹³⁷

The required excavation for all of the roadway came to approximately 134,840 cubic yards, or 99.1 percent of the estimated quantity of 136,000 cubic yards of roadway excavation contained in the bid schedule (Exhibit No. 239). In addition, the excavation actually completed by the contractor was less than the neatline volume required even though field changes were made.¹³⁸

Under the circumstances the equitable adjustment clause of Paragraph 139 is inapplicable and compensation on the basis of its unit price is all that the appellant is entitled to be paid.¹³⁹ The appellant has not established that increased costs were in fact incurred in doing the field-directed work.¹⁴⁰

The appellant has stated that the necessities of road construction, resulting from Government revisions, caused it to place more fill ("excessive fills") than would have been

the case if the road had not been altered after bidding.

Under Paragraph 144 (Disposal of Excavated Materials) appellant was put on notice that fills would be widened with excess excavation in areas of substantial cut. In pertinent part Paragraph 144 reads:

Except as otherwise specified all suitable materials excavated for the construction of the roadway and boat ramp shall be used in the construction of embankments and for refill of excavation below subgrade or finished grade. Where the quantity of excavation exceeds that required to construct the embankments and excavation refills to the nominal cross sections shown on the drawings, the surplus suitable material shall be used to widen the embankments uniformly along one or both sides as directed, and no such material shall be deposited in waste banks unless such waste is directed.

We also can find no support in the record for appellant's contention that it was compelled to perform excessive cuts. It appears, rather, that in many instances the as-constructed centerline was shifted away from the sidehill and as-staked centerline.¹⁴¹ This was permitted by the Government's field personnel in order to reduce the amount of difficult excavation when harder material was encountered, such as between Stations 115+00 and 125+00. According to Govern-

¹³⁷ The very existence of provisions such as Paragraph 139 providing for resloping or re-dimensioning of excavations is a strong indication that modifications are to be expected. *R. E. Hall Construction Company & Clarence Braden, IBCA-465-11-64* (September 26, 1967), 67-2 BCA par. 6597.

¹³⁸ From Station 10+00 to Station 326+90, the appellant actually excavated 6,695 cubic yards less than the neatline quantity (Exhibit No. 239), an underrun of 5.2 percent.

¹³⁹ *R. E. Hall Construction Company*, note 137, *supra*.

¹⁴⁰ Under provisions such as Paragraph 139, it is contemplated that immediate payment will be made at unit prices for resloped or redimensioned excavation with further adjustment if the contractor is able to show that increased costs had been incurred in doing the work as directed in the field. *R. E. Hall Construction Company*, note 137, *supra*.

¹⁴¹ See Government Exhibits B-479 through B-481, B-499, and B-500, which depict the Government's survey of original ground, the design neatline as staked for construction, and the final as-built roadway (64 Tr. 7042-46). Other illustrations of shifting are Government Exhibits B-455, B-456, and B-464 through 466, which are photographs of the roadway with the as-designed centerline marked with stakes.

ment survey data, the as-constructed road was shifted away from side-hill and designed centerline over a total distance of 2,917 feet, which is 10.7 percent of the entire length of road (27,266 feet) constructed by the appellant (Government Exhibit B-482).

The Government asserts that the appellant has been credited for payment purposes with every cubic yard of material which it excavated, whether the excavation was within the designed neatline area or not, with the exception of some excavation work done on the Upper Recreation Area Access and Middle Camping Area roads which was paid to neatline. (Government Posthearing Brief, 177). It is said that although the contracting officer was authorized by the contract to make payment on a neatline¹⁴² basis only, excluding those minor access roads the appellant was paid for actual excavation (Government Posthearing Brief, 519).

The contracting officer directed that final payment be based on an as-excavated survey for the reason that the appellant contended it was not reimbursed for all extra excavation.¹⁴³ The exhibits support the Government's contention that the

contractor was credited for payment purposes with every yard of material excavated, whether it was within design neatline or not.¹⁴⁴ According to Mr. Moore, whenever a minor discrepancy occurred between the original ground survey and the final survey, the appellant was given the benefit of the doubt for payment computations and the larger figure was used (71 Tr. 7890).

The appellant, however, takes the position that payment of unit prices is irrelevant since the work was "radically changed * * * and the damages can be measured only by the increased costs" (Appellant Posthearing Reply Brief, 48). The difficulty is that the appellant has furnished us with insufficient evidence on which to base a finding that it was damaged and to what extent. The contractor has not demonstrated that the quantity computations by the Government were incorrect.

We do, however, regard the appellant as entitled to some allowance as a result of the Government's mis-staking of the roadway side slopes in areas of rock. The appellant claims that the Government staked the entire section of the roadway between Station 10+00 and the dam axis at a 1:1 backslope (which is the backslope required for common material) rather than 1/2:1, as called for by the specifications in

¹⁴² Paragraph 139c. provides that measurement for payment of excavation for the roadway would be made only to the neatlines as shown on the drawings or established by the contracting officer.

¹⁴³ Appellant's complaints are found in Exhibit Nos. 108, 117, 147 and 219 Mr. B. P. Bellport, the contracting officer, and Mr. Moore testified it was the Government's intention to credit the contractor for payment purposes for every yard excavated (45 Tr. 5093-96; 71 Tr. 7871-72).

¹⁴⁴ Mr. Lasko supervised the final survey (62 Tr. 6965-66). Mr. Moore supervised the computations for final pay quantities for the roadway (30 Tr. 3419; 71 Tr. 7870-79). The final quantity books are in evidence as Appellant Exhibit C-128.

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fractured rock, and 1/4:1 in rock. The extent of appellant's damage as a consequence of the mis-staking is unclear. The only documentation before us is Government Exhibit B-483 which shows a total of 567.4 feet as having been originally staked at 1:1 and subsequently restaked at 1/2:1. Of the entire length of road constructed by appellant (27,266 feet), a total of 988.5 feet, or 3.6 percent, was staked at 1/2:1. The allowance to be made to appellant by reason of the mis-staking will be taken up *infra* in the discussion of the equitable adjustment.

In all other respects, the claim is denied.

TUNNEL

The tunnel is indicated on Drawing 526-D-2702 as extending from Station 4+34 to Station 14+36. Appellant's claim consists generally of two basic items, excavation and concrete lining. The tunnel was driven to too large a diameter and required significant amounts of concrete re-fill beyond the Government pay-lines, for which the appellant was not paid unit prices. The appellant contends that the overlarge size occurred because of rock overbreak which resulted from changed conditions respecting the rock encountered during excavation,¹⁴⁵ construc-

tive changes in design, and Government survey errors. The Government's position is that the rock was as represented and that the overlarge general diameter was caused by a combination of the readily anticipatable features of the rock, the appellant's blasting procedures and inadequate contractor survey.

Appellant maintains that Bureau geologists had knowledge of adverse geological conditions which could affect the contractor's operations, such as solution caverns, faults, shear zones, and clay seams, but that such information was withheld from it. On the other hand, it is alleged that the tunnel designers had no understanding of the nature of the subsurface rock which the contractor might encounter.

Claim Resulting from Survey Errors

The appellant maintains that it was required by Bureau survey errors to perform a series of unwarranted multiple tight rock excavation operations under adverse

planned work under adverse conditions. The appellant there asserts that its increased costs in tunnel excavation were not related to overbreak but to "the subsequent cycles of multiple re-excavation and related work required by the Bureau under the adverse conditions presented." In view of the above appellant's position respecting its tunnel changed conditions claim is not clear. Since the appellant alleged in Exhibit No. 147 that the tunnel changed condition claim is based upon the same "unsound and unstable rock that affected the open cut work," the discussion therein in the Open Cut Excavation claim *infra* is applicable. A related question, the contractor's request "for relief under Paragraph 55" (note 172 *infra*) by movement of the B line in the tunnel and access shaft, is hereinafter treated in this section.

¹⁴⁵ Exhibit Nos. 91, pp. 3 and 147. However, at 49-52 of its Posthearing Reply Brief, appellant alleges that the issue is not one of changed conditions based upon overbreak, but that the Government breached the contract by taking over the tunnel surveys and subjecting appellant to multiple re-excavation, movement of steel and forms and related un-

geological conditions. The appellant characterizes as "the most reprehensible of an inexcusable series of survey errors and changes" (Appellant Prehearing Brief, 64), a temporary benchmark erroneously placed by the Government,¹⁴⁶ respecting tunnel elevation. The tunnel commences upstream at about Station 4+36. The Government set two points outside the tunnel to establish the alignment of the first tangent of the tunnel which ran from approximate Station 4+34 to Station 4+38. The start for all tunnel elevation control was a U.S.G.S. brass cap¹⁴⁷ in the vicinity of and across the road to the west from the gauging station. The elevation at this brass cap was determined to be 5,821.99. From this cap, on July 29 and 30, 1963, a Government survey crew ran a closed level circuit survey to spillway Temporary Benchmark (TBM) No. 1, which was an iron pin 1½ inches in diameter used as vertical control for the spillway and outlet works (Appellant Exhibit C-43). It was about 100 feet left of spillway Station 10+00. The elevation established there was 5827.021 with an error of closure of 0.0004.

On August 14, 1963, the Government survey team ran another closed

level circuit from spillway TBM No. 1 to a 2-inch by 2-inch wooden hub driven into the ground which had been set by Government surveyors on July 23, 1963, on the centerline of the outlet works approach channel at Station 2+70.07 opposite the upstream portal. The elevation established on the top of the hub was 5,843.46, with an error of closure of 0.030. The hub was intended for tunnel control and was flagged. When the contractor started tunnel excavation at the upstream end on August 15, 1963, it used this control point for the alignment and grade.

The appellant had some difficulty with the turning of the first horizontal curve on the second tangent at or about Station 4+68, when it took a wide loop of half a foot getting around the corner, causing overbreak on the right and tightness on the left (20 Tr. 2158-59). The appellant also established a temporary benchmark for its own use at or about Station 4+75 (17 Tr. 1931).

It is apparently undisputed that the section of the tunnel from approximate Station 5 to approximate Station 6 was carried intentionally high by one foot by the appellant's surveyor, Mr. Paul Croney. Moreover, it appears that Mr. Croney had an error in his computation which resulted in an additional one foot higher elevation than the proper grade.¹⁴⁸

¹⁴⁶ Paragraph 20, in pertinent part, reads:

"The contracting Officer will establish benchmarks and lines and grades at each portal of the tunnel. The contractor shall perform all other survey and layout work within the tunnel and shaft."

¹⁴⁷ The U.S.G.S. benchmark had previously been established by levels run from a Utah State engineer's bronze disc which was incorporated in the Lost Creek control system as Triangulation Station No. 2 (Exhibit No. 251, par. 162).

¹⁴⁸ 17 Tr. 1874-76, 1942-43; 19 Tr. 2122-23; Government Exhibit B-302 (August 27, 1963), p. 4.

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Elevations were carried into and through the tunnel by means of spads placed in the roof of the tunnel (15 Tr. 1595-96). From these, pieces of chain were hung and the appellant sighted through a washer held at the bottom of each of two chains. The center of the tunnel excavation was thereby marked on the heading face (19 Tr. 2126). The approximate location of the "A" line (defined in Paragraph 55) was established from this centerline and marked with paint (20 Tr. 2177).

Excavation was accomplished through the use of a machine called a "Jumbo" which ran on a track. Two drills were mounted on arms on the Jumbo so that they could be swung from the centerline around the outside. The drill on the left would drill that side and the drill on the right would drill the right side (20 Tr. 2171-2183).

About September 1, 1963, Government surveyors began checking and marking "tights" in the tunnel. The wooden hub at Station 2+70.07 was used in establishing both vertical and horizontal control for this work. According to the appellant, the hub was accidentally disturbed sometime between September 1 and September 5, 1963. The Government's position is that the hub was destroyed by the contractor's operations at the tunnel inlet portal between September 15 and September 23, 1963.

The appellant asserts that after the hub was knocked out, at its request, it was given a replacement elevation on the south base, across

on an embedded boulder to the right of and about 60 feet upstream from the upstream portal. The Government, however, has denied that this was ever given to the appellant as an elevation reference.¹⁴⁹

Thereafter, on September 30, 1963, a steel pin benchmark (known as Temporary Benchmark C or TBM C) was established at a point 125 feet right of Station 2+70 by a closed level circuit run from Triangulation Station No. 11, at elevation 5,848.44. The elevation given was later found to be 0.2 of a foot higher than the actual elevation at that point. Triangulation Station No. 11 was located at elevation 5,918.05. The Government claims levels were run at this time from Triangulation Station No. 11, rather than from Spillway TBM No. 1, because of the appellant's activities on the dam and the more accessible location of Triangulation Station No. 11.

The Government insists that this benchmark was established for its sole convenience. Its position is that the contractor had already completed tunnel excavation to Station 11+41 (Appellant Exhibit C-43; Government Exhibit B-302, p. 34), and that therefore only about 291 feet remained to be excavated. Consequently, according to the Government, there appeared to have been no need for control to be again set

¹⁴⁹ The contracting officer found that from the time the original hub at Station 2+70.07 was destroyed until the incorrect benchmark was established, the appellant made no request for a benchmark at the inlet portal (Exhibit No. 251, par. 168).

for the contractor's use at that time. The Government maintains, however, that the elevation was noted on a stake alongside the new benchmark and the benchmark was flagged and was available for use by the contractor.

After the Government had established the new upstream benchmark, on October 2, 1963, it set TBM No. 6 inside the tunnel below the gate chamber at a given elevation of 5,839.04. It subsequently developed that TBM No. 6 had an elevation error almost identical to that of TBM C. In the appellant's view, the error resulted from the erroneous new upstream benchmark, but the Government's position is that TBM 6 was established from an inside tunnel control placed during an earlier survey.

Tunnel excavation was completed about October 31, 1963. On December 26, 1963, it was discovered that TBM C had been set 0.2 feet too high, *i.e.*, the correct elevation of the steel pin was 5,848.24 instead of 5,848.44, or 0.2 feet lower than the elevation assigned. The error was discovered while the Government was routinely checking "tights" and alignment and the contractor was about to place steel which required considerable accuracy.

The appellant alleges that it was furnished the Bureau's 1963 survey (Appellant Exhibit C-73), which was inaccurate as contrasted with the Bureau's survey of 1964 (Appellant Exhibit C-74). It contends it was obliged to rely on it in its excavation operation in the event of any

discrepancy between its line or grade and the Bureau's line or grade.¹⁵⁰ The appellant maintains that the inaccuracy of the survey caused it to remove additional material that was not really tight.

The Government's position is that the Exhibit C-73 survey was not intended to be wholly accurate (17 Tr. 1812) and was not meant to be used for payment purposes (16 Tr. 1725, 1738). It was an informal survey run merely to satisfy the Government that the contractor's alignment and grade were at least approximately in the right places.¹⁵¹ Its purpose was to check on the contractor's survey performance (Government Posthearing Brief, 418).

As measurements were made, at the request of the contractor tights were marked (16 Tr. 1770). In its Posthearing Brief (at 420) the Government questions how long such markings could have been visible since the tunnel walls quickly became covered with muck and smoke. The Government also asserts that the appellant has failed to identify the specific locations where the alleged inaccuracy of survey C-73 caused it to remove additional material that was not really tight.

¹⁵⁰ Appellant Posthearing Brief, 283. Mr. Miller testified (15 Tr. 1600) :

"Q. And wherever you found that there was a discrepancy between your survey and their survey, which survey did you adhere to?

"A. Always theirs."

¹⁵¹ Government Posthearing Brief, 420-21. Thus, the Government contends that if it had allowed problems such as Mr. Croney's 2-foot error at Station 6+00 to continue, the entire work would have been substantially delayed while the contractor corrected its errors and the contractor's expense would have been substantially increased.

In addition, the Government maintains that the appellant has not produced any concrete evidence to show that the 1963 survey was inaccurate other than the comparison with the 1964 survey (Appellant Exhibit C-74). According to the Government, there is no evidence that a "tight" at a specific place was unnecessarily removed, since the "contractor buried his mistakes and those of the Government (if any) in concrete long before the present survey claim was made" (Government Posthearing Brief, 422).

As for the 1964 survey the Government admits that it was more accurately done (17 Tr. 1839). Its purpose was to establish precise control for check-out by the Government of the concrete forms and reinforcing steel in connection with concrete placement. The Government asserts that the appellant has shown no damage from the fact that survey C-74 was run and tights were marked in the course thereof.

The Government's position is that the appellant's own survey, which was the latter's obligation under Paragraph 20, was improperly performed (Government Posthearing Brief, 452). In support of this assertion it cites statements in various Government reports and diaries.¹⁵² One such reference appears in Mr. Johnson's diary (Appellant Exhibit C-239, p. 135) to the effect that the contractor's carpenters were com-

plaining that they had no reliable grades to work off since Mr. Miller had run so many surveys and each survey was marked with a different nail.

The damage allegedly sustained by the appellant resulting from the erroneous benchmark and surveys, as set forth on 72 of its Prehearing Brief is as follows:

- (1) Driving the greater part of the tunnel from an erroneous benchmark;
- (2) having "tights" marked and removed from an erroneous benchmark;
- (3) being required to go back after discovery of the error to remove additional "tights" by tedious small charges;
- (4) additional slushing out and clean-up;
- (5) resetting concrete forms;
- (6) approximately five days' delay waiting for Bureau approval to proceed;
- (7) plus disruption, delay and expense caused by this extra work.

Decision

It was unquestionably a very costly operation for the appellant to remove the tights from the bottom of the tunnel.¹⁵³ There is insufficient evidence in the record, however, to support a finding of Government responsibility for this expense.

Under paragraph 20a. the contracting officer was required to establish benchmarks and lines and grades at each portal of the tunnel and the contractor was made responsible for the performance of all other survey and layout work within

¹⁵² Government Exhibit B-303 (January 17, 1964), pp. 141 and 217 (May 14, 1964); Appellant Exhibit C-246, p. 305; Appellant Exhibit C-104 (January 20, 1964), p. 59; Appellant Exhibit C-239 (May 14, 1964), p. 135.

¹⁵³ According to Government Exhibit B-599, tunnel mining cost \$73,077.86 and appellant's total labor expense in connection with excavation in the tunnel, gate chamber and shaft was approximately \$106,000.

the tunnel and shaft. The appellant has admitted that it was obliged to carry on all survey operations underground.¹⁵⁴ Nevertheless, the appellant has not produced any survey data of its own in written form. Mr. Miller testified that he kept his notes on scrap paper which he did not retain (19 Tr. 2129; 26 Tr. 2980).

The appellant has sought to impose responsibility on the Government by asserting that it always followed the Bureau survey and by pointing to the existence of various benchmarks and survey errors by the Government. Reliance on the Government surveys did not abrogate the appellant's contractual obligations, however.

Beyond this general allegation, the appellant has not furnished us with any specific proof of location wherein Government inaccuracies caused it additional expense. An appellant does not sustain its burden when it merely points to the existence of Government errors which may have accounted for its difficulties. Errors are regarded as more or less inherent in surveying.¹⁵⁵

The appellant picked up survey elevation and line and grade control from Temporary Benchmark A and B at Station 2+70, which the Government had established (Exhibit X-8), and commenced excavation

of the tunnel (15 Tr. 1595). The first major difficulty that the appellant encountered was the turning of the curve onto the second tangent or leg of the tunnel at or about Station 4+68.¹⁵⁶ Mr. Miller admitted that this was the contractor's responsibility (19 Tr. 2121; 20 Tr. 2157-59).

When the appellant arrived at approximately Station 4+50, it asserts that its excavated elevation was not consistent with the elevation of the spring line (centerline). Appellant maintains that an elevation on a Government rock bolt was obtained from Mr. Lowell Johnson, the Bureau chief of surveys. However, if this elevation was based on the erroneous elevation of TBM C, the tunnel should have been constructed consistently too low by 0.2 feet and the appellant should have had sizable tight problems in the upper part of the tunnel, as Mr. Miller admitted.¹⁵⁷ It appears that the contractor's problems were largely in the bottom rather than in the top.¹⁵⁸

¹⁵⁶ The first tangent or leg of the tunnel ran from approximate Station 4+34 to the P.I. at or about Station 4+68. The difficulty encountered is described by Mr. Ibach in his reports of August 20 and 21, 1963, in Government Exhibit B-310.

¹⁵⁷ Mr. Miller testified (21 Tr. 2342):

"Q. So if we drove the tunnel from the wrong benchmark that was two-tenths high, we ought to be tight where?

"A. On this assumption, we should be tight at the top.

"Q. We should be tight at the top?

"A. Yes.

"Q. And we should be overbroke at the bottom?

"A. That's correct."

¹⁵⁸ 15 Tr. 1624; 17 Tr. 1940, 1942; 20 Tr. 2201; 21 Tr. 2291, 2303.

¹⁵⁴ Exhibit No. 91. Appellant maintains, however, that the Bureau effectively controlled the surveys and it was required to conform to the Bureau surveys and survey errors (Appellant Posthearing Brief, 279).

¹⁵⁵ *Poblete Construction Co., ASBCA No. 10921* (February 12, 1968), 68-1 BCA par. 6860, at 31,718.

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Temporary Benchmark C was set for the sole convenience of the Government. The contracting officer found that the Government had no knowledge of any use of it by the appellant (Exhibit No. 251, par. 168). But even if the appellant did refer to the benchmark, we are of the view that the appellant was not justified in relying on it to the extent claimed.

Having been required under the contract to provide the underground survey, appellant's acquiescence, when in doubt, with the Bureau survey is an indication of lack of confidence in the accuracy of its own survey.

Moreover, when TBM "C" was established, the contractor had already completed the tunnel excavation to Station 11+41 and there were only about 291 feet (to Station 14+36) remaining to be excavated (Exhibit No. 251, par. 166). The contracting officer found that there was apparently no need for control at that time to be again set for the contractor's use, since the appellant had carried elevations into the tunnel (by means of spads in the roof) (Exhibit No. 251, pars. 166, 168).

The appellant has also not established that the 1963 survey identified as Exhibit C-73 resulted in additional expense to it. The mere existence of a discrepancy between it and the 1964 survey is an insufficient basis upon which to predicate Government liability for additional work.

Even if it is assumed that an incorrect benchmark was used by the

appellant, evidence that the contractor reexcavated any portion of the tunnel to a corrected elevation is lacking (Exhibit No. 251, par. 169). On the contrary, it is apparent from the tunnel cross sections that the tunnel floor was excavated to irregular lines so that a 0.20 foot difference in elevation could have had no substantial effect on the appellant's operations.

The appellant has not sustained its burden of proof. The claim is denied.

Cavern and Mud Slides

On October 10, 1963, while appellant was excavating the tunnel, it intercepted two interconnecting solution caverns at about Station 12+75 which it claims were undisclosed and unanticipated. Appellant alleges that both caverns were filled with mud in the form of saturated clay (Posthearing Brief, 256), although the evidence is in dispute as to whether both were filled.¹⁵⁹ In any event, work in the area discontinued at the direction of the Government. It was necessary for the contractor to remove from the tunnel floor material which had fallen from the cavities. The contractor was also required to install steel supports to support the cavernous areas and, ultimately, to backfill them. Work on the tunnel resumed on October 16, 1963, after the steel supports were installed.

¹⁵⁹ According to Mr. Miller, both caverns were filled (19 Tr. 2144, 2146). Mr. Wilcox, however, testified that only the left cavern was full of mud (72 Tr. 8030).

The appellant initially proposed that the cavern voids be filled with concrete from the top.¹⁶⁰ The Government, at first, appeared to approve and even located a stake where a hole might be drilled from the ground surface above the tunnel alignment.¹⁶¹

However, on January 24, 1964, the Government directed that the caverns be filled partially with concrete to the extent that utilization of the pumpcrete machine was feasible from within the tunnel. The remaining area was to be backfilled by injecting under pressure a grout mix of sand, water, cement and bentonite through standard metal pipes embedded in the concrete.¹⁶² Eventually the appellant was permitted to use flexible plastic pipe, instead of metal pipe, which necessitated bracing. The concrete was pumped into the caverns in May 1964. The grouting took place from July 22-25, 1964. In all, a total of 1,040 sacks of cement and 115.1 cubic yards of grout and sand were used (Appellant Exhibit C-57, p. 1).

By letter dated August 25, 1964, the appellant estimated that 115

cubic yards of mud were removed and requested compensation therefor (Exhibit No. 39), which the appellant concedes was paid (Post-hearing Brief, 262). Under Change Order No. 3, the appellant was also compensated in the amount of \$113.85 for furnishing the steel tunnel supports and in the amount of \$81.90 for timber lagging used in connection with tunnel support and \$133.83 for bracing the plastic grout pipe. Subsequently, by virtue of Findings of Fact 1, par. 67, the contracting officer increased the timber lagging allowance to \$369.89 and the bracing allowance to \$163.97.

The dispute relates to the directed method of filling the voids. The appellant contends that the Government elected to use grout and grout sand for the bulk of the backfill rather than concrete in order to take unreasonable advantage of the contractor's low bid price of \$2.24 per cubic yard for furnishing and handling sand for grouting foundations (Bid Item 28). According to the appellant the bid contained a decimal point error and should have been \$22.40 (43 Tr. 4805).¹⁶³ The appellant has been compensated at the rate of \$2.24 per cubic yard for the grout and grout sand.

Decision

The existence of undisclosed solution caverns does not constitute a changed condition. The entire tunnel was dug in moderate to thin-

¹⁶⁰ 18 Tr. 1984; Appellant Exhibit C-57, p. 2; Exhibit B-302, p. 52.

¹⁶¹ 18 Tr. 1985; Appellant Exhibit C-45.

¹⁶² Exhibit No. 16; Appellant Exhibit C-58. It is the position of the Government that the solution caverns:

"* * * are a misplaced issue since the Government has conceded that they required treatment and payment above and beyond that provided simply by application of the unit prices for Tunnel Excavation (Item No. 7) and Concrete in Tunnel Lining under Item 40. The Government accordingly by virtue of Exhibit 16 ordered the contractor to take additional steps to backfill the caverns under applicable provisions of the contract" (Government Posthearing Brief, 388).

¹⁶³ In Findings of Fact 1, par. 58, the contracting officer characterized the bid price of \$2.24 per cubic yard as "absurdly low."

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bedded limestone (Appellant Exhibit C-18, p. 7). That such caverns will be present in limestone should be assumed, in the opinion of Dr. William L. Gardner, Chief of the Bureau's Division of Engineering Geology (57 Tr. 6314). The appellant should have learned this during its pre-bid investigation.¹⁶⁴ Merely because the Pre-construction Geologic Report prepared in 1962 by staff geologists did not anticipate solution caverns is not determinative. These reports were regarded as preliminary only and were not made available to bidders (57 Tr. 6314). Accordingly, the appellant could not have been misled by them at the time of bidding.

It is correct that the contract subsurface investigation data did not specifically disclose the existence of the caverns, but Paragraph 76a. of the specifications indicates that "cavities or fissures" may be encountered. Government subsurface data, moreover, are not unqualified representations of what will or will not be found; rather, they are regarded merely as sampling operations.¹⁶⁵

The Government goes beyond this position and maintains that the contractor has been fully compensated at applicable bid prices or through Change Order No. 3 for encountering the solution caverns (Posthearing Brief, 391). It appears to us that utilization of the method directed of filling the solution caverns

with grout and grout sand is contemplated under Paragraphs 76a. and 72a. of the specifications.¹⁶⁶

Mr. James Doman, a design engineer in the Bureau's spillway and outlet works section, recommended to the contracting officer that the grout sand method be used because grout could be injected under higher pressures and would more fully fill the caverns than the concrete originally proposed (61 Tr. 6834-35). The contracting officer followed his recommendation and has testified that he had no personal knowledge of the appellant's low bid price and was not influenced by it (65 Tr. 7165-66).

We therefore find that the method directed of filling the caverns with grout and grout sand was appropriate and was not an attempt by the Government to take unreasonable advantage of the contractor's low bid price for that item.¹⁶⁷

With respect to any additional compensation appellant may be seeking in connection with this claim, relating to the quantity of

¹⁶⁶ In pertinent part, Paragraph 76a. reads:

"In certain areas where cavities or fissures are encountered, or where the quantity of grout injected becomes excessive, sand and an admixture of bentonite may be required as an ingredient of the grout."

Paragraph 72a. provides for grouting of rock surrounding the outlet works tunnel.

¹⁶⁷ Inasmuch as the Board does not have authority to reform a contract, it cannot act upon appellant's assertion that its bid price on Item 28 was erroneous. *Dallas Tile Co.*, VACAB No. 504 (April 28, 1965), 65-1 BCA par. 4816; *Pax Electronics Co.*, ASBCA Nos. 8286 and 8927 (July 30, 1964), 1964 BCA par. 4350; *Manhattan Lighting Equipment Co.*, ASBCA No. 6533 (August 30, 1961), 61-2 BCA par. 3140.

¹⁶⁴ See *Hunt and Willett, Inc.*, note 75, *supra*.

¹⁶⁵ *Inter-City Sand & Gravel Co. & John Kovtynovich*, IECA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215, at 9707.

material excavated, the supports and bracing, the appellant has not sustained its burden of proof. An extension of time also does not appear warranted beyond the extension of time of twenty calendar days appellant received by virtue of Change Order No. 3, which encompassed this claim (Exhibit No. 221, par. 73).

The claim is denied.

Reservoir Level Gage Piping

Under Bid Item 58, the appellant was required to furnish and install a reservoir level gage and piping, *inter alia*, for the lump-sum price of \$1,679, in accordance with Paragraph 126 of the specifications and Drawings No. 526-D-2735 and 526-D-2736. Appellant attempted to place the piping at the location specified in the drawings, but placement in that manner could not be accomplished (18 Tr. 2033).

The appellant was then directed to install the reservoir level gage piping outside the reinforcing steel and rubber water stop at an elevation one foot above the horizontal centerline of the tunnel. According to the appellant, it was required to excavate a pathway for the piping approximately three inches deep and six inches wide in areas of hard rock by hand for a distance of approximately two hundred feet (33 Tr. 3749-50; 18 Tr. 2034-36).

By means of Change Order No. 3 (Exhibit No. 4), the contracting officer allowed appellant the sum of \$96.44 for the additional work of

chipping rock from the tunnel wall between Stations 5+80 and 6+10 in order to install the piping. Thereafter he increased the award to \$103.28 in Findings of Fact No. 1 (par. 67).

The appellant contends that the contracting officer erred in determining that only some 30 additional feet of rock excavation were required by the change and that the adjustment was therefore inadequate (Prehearing Brief, 77).

Decision

The question in dispute is the actual amount of rock the appellant had to excavate to place the pipe. At 77 of its Prehearing Brief, the contractor alleges that "the actual distance involved in the change was approximately 534 feet." On the other hand, at the hearing, Mr. Doak estimated that the pathway for the piping was "in the neighborhood of * * * two hundred feet" (33 Tr. 3751). The discrepancy in distance has not been explained.

Examination of appellant's Periodic Labor Cost Breakdowns (Appellant Exhibit C-257) reveals that the sum of \$140.90 was attributed by it to Bid Item "#58 Reservoir Level Gauge" from July 19, 1964, continuously through February 6, 1966. That figure is inconsistent with excavation allegedly of 534 feet or of 200 feet.

Under the circumstances, the claim is allowed only in the amount of \$37.62, which is the difference between \$140.90 and the amount previously awarded, \$103.28.

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Access Shaft and Shaft House

The contract called for a concrete lined access shaft, 7 feet 6 inches in diameter, extending from ground surface nearly 200 feet downward to the gate chamber in the tunnel. To be situated atop the access shaft at elevation 6,022 was a reinforced concrete shaft house which was designed to be supported in part by the shaft and in part by the adjacent rock surface, as shown on Drawings 526-D-2702 (Exhibit X-2), -2707, and -2708. The design was based upon the presence of rock at this elevation according to Drill Hole 17. Drill Hole 17 has a collar elevation of 6,028.3 (Drawing 526-D-2753) and the log indicates limestone at a depth of six feet.

Appellant commenced common excavation for the access shaft and shaft house on August 30, 1963. Bed-rock was reached on September 14, 1963, not at elevation 6,022 but at elevation 6,016.¹⁶⁸ The contractor removed the material down to elevation 6,015 with bulldozers and front-end loaders (18 Tr. 2009; 21 Tr. 2382).¹⁶⁹ The material removed between 6,022 and 6,016 was common material, which was impossible to

¹⁶⁸ The conditions exposed upon excavation showed that the rockline in the area plunged rather steeply away from the valley (Government Exhibit B-438). As a result, instead of finding a level table of rock at elevation 6,022, appellant found a knob or bulge of rock protruding that fell away sharply down across the shaft (18 Tr. 2006-08).

¹⁶⁹ In this area it appears that everything above elevation 6,022 had to be removed as a part of the spillway excavation in any event whether the shaft house had been there or not (74 Tr. 8184), although Mr. Miller did not agree (21 Tr. 2378-80).

shoot or blast (21 Tr. 2385-86). Shaft excavation is traditionally thought of as blasted shot-type work (21 Tr. 2385).

On October 12, 1963, drilling and shooting were started in the access shaft upward from the gate chamber and continued to approximately elevation 5,983, or 33 feet below the exposed rockline surface. The appellant then ceased excavating the access shaft from the gate chamber and started blasting downward from the exposed rockline surface (elevation 6,016) by detonation of explosive charges set in 30-foot deep drill holes. The shot was set off on Sunday, December 1, 1963, when Government personnel were not present (21 Tr. 2394; Appellant Exhibit C-47, p. 2). The rock contained in the three feet below the drill holes did not break on the first blast as was anticipated. Two additional shots were required to break through the rock to its lower surface located at the gate chamber 33 feet below the rockline surface.¹⁷⁰

The Government has taken the position that the blasting technique used by the contractor resulted in considerable overbreak in rock excavation above elevation 6,005. This allegedly caused the shaft to have a "funnel" shape with overexcavation increasing toward the uppermost portion.¹⁷¹ Mr. Miller, however, testified that the drilling and blasting operations were performed

¹⁷⁰ Government Exhibit B-302 (December 2, 3, 4, 1963).

¹⁷¹ Exhibit No. 251, par. 149; Exhibit No. 221, par. 47.

with care and the overbreak was not due to overblasting (18 Tr. 2020).

Following excavation at the top of the access shaft, the appellant was advised by letter, dated December 10, 1963, that the shaft house foundation was affected by its blasting methods (Exhibit No. 14). The appellant was called upon to furnish a plan for repair of the damage pursuant to Paragraph 55 of the specifications.¹⁷²

¹⁷² "55. *Excavation in Tunnel Gate Chamber and Access Shaft*

"The item of the schedule for excavation in tunnel gate chamber and shaft includes all excavation performed by tunnel excavation or shaft driving methods for the outlet works tunnel, gate chamber and access shaft.

"Excavations shall be made to the lines, grades, and dimensions shown on the drawings or established by the contracting officer. The general dimensions, arrangements, and details of typical sections of the tunnel and shaft are shown on the drawings. Permanent tunnel and shaft supports shall be furnished and installed by the contractor where necessary, as determined by the contracting officer, in accordance with Paragraph 56. Temporary timbering may be used in accordance with Paragraph 57. During construction the tunnel and shaft shall be drained, lighted, and ventilated in accordance with Paragraph 58.

"The 'A' lines shown on the typical sections of the drawings are lines within which no unexcavated material of any kind and no supports, other than permanent [sic] structural-steel supports will be permitted to remain.

"The 'B' lines shown on the typical sections are the outside limits to which measurement, for payment, of excavation will be made, and measurement for payment will in all cases be made to the 'B' lines regardless of whether the limits of the actual excavation fall inside or outside of the 'B' lines.

"The nature of the materials being excavated may make it necessary, as determined by the contracting officer, to increase the distance between the 'A' line and the finished interior lining surfaces of the tunnel and shaft, in which event the position of the 'B' line will be changed in such a way as to maintain at every point the same distance between the 'A' and 'B' lines as existed before the position of the 'A' line was moved: *Provided*, That where steel supports, other than steel liner plates alone, are used, the 'B' line will be

No plan was received from the contractor (Exhibit No. 251, par. 150). In the meantime, however, the Government redesigned the shaft house foundation (Appellant Exhibit C-48).

According to the contracting officer, there were two factors which made a redesign of the upper portion of the access shaft and shaft house foundation necessary (Exhibit Nos. 221, par. 47; 251, pars.

moved so as to be located outside of the outer face of the approved steel supports the distance shown on the drawings. The contractor shall be entitled to no additional compensation because of such changes other than that resulting from the increased quantities due to the new positions of the 'A' and 'B' lines: *Provided further*, That any additional excavation required on account of enlargement of section, ordered in writing after the completion of the excavation of the section to the previously described dimensions, will be paid for as extra work in accordance with Paragraph 7. Where foundation conditions, as determined by the contracting officer, require additional excavation for extending structural-steel ribs, wall-plates, footplates, or other approved structural-steel members, such excavation will be included for payment under the items of the schedule for excavation in tunnel and shaft.

"The contractor shall use every precaution to avoid loosening material beyond the 'B' lines. All drilling and blasting shall be performed carefully so that the material outside the 'B' lines will not be shattered. Any damage to or displacement of tunnel supports and any damage to any other part of the work caused by blasting or any other operations of the contractor shall be repaired at the expense of and by the contractor and in an approved manner.

"Immediately following excavation in unsupported sections, all loosened material either inside or outside of the 'B' lines that, in the opinion of the contracting officer, is liable to fall shall be removed.

"All material projecting inside the 'A' lines shall be removed by the contractor as part of the work described in this paragraph. The removal of such projections within the 'A' lines may be performed at any time during the progress of the work: *Provided*, That immediately before the concrete lining is placed, the contractor will be required to remove all material then extending within the 'A' lines. Excavated materials shall be placed in dam

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150 and 151). The first was the fact that the actual rock surface was six feet lower than indicated in the specifications and assumed in the design. The second factor was the funnel-shaped excavation allegedly caused by the appellant's blasting techniques.

By letter dated February 20, 1964, the Government transmitted to the appellant revised Drawings 526-D-2702, -2708, and -2728 to indicate the design changes near the top of the access shaft (Exhibit No. 17).¹⁷³ The letter called upon the appellant to submit data for the cost of the additional work required by the redesign between elevations 6,016 and 6,022. Limiting the Government's responsibility to those elevations reflected the Government's determination that the appellant was responsible for the funnel-shaped excavation and refill thereof as a result of its blasting techniques.

embankment Zone 2 upstream or dam embankment Zone 3 downstream.

"Measurement, for payment, of excavation in tunnel, gate chamber and shaft will be limited to the specified sectional dimensions and will be made along the located centerline of the tunnel and shaft only for such reaches of the tunnel and shaft as are excavated by tunneling and shaft-driving methods. Payment for excavation in tunnel, gate chamber, and shaft will be made at the unit price per cubic yard bid therefor in the schedule, which unit price shall include the entire cost of excavation, transportation and disposal of excavated materials."

¹⁷³ Drawings 526-D-2708 and -2728 were subsequently revised on June 19, 1964 (Exhibit Nos. 29A and 29B) after detailed measurements of the overbreak in the access shaft excavation were made and it was found that the overbreak was greater than the Government had previously estimated (Exhibit No. 59). The revised drawings were transmitted to the appellant by letter dated July 2, 1964 (Exhibit No. 29):

The contractor, however, contends that the Government is entirely responsible for the additional costs incurred by the redesign. By letter dated September 10, 1964, it submitted its proposal for a price adjustment in the amount of \$26,935 for work in the gate chamber, access shaft and shaft house (Exhibit No. 48). The proposal included component prices for rock excavation (\$6,200), waterstop (\$178), reinforcing bars (\$1,180), forms (\$2,200), compacted backfill (\$1,300), fillet form (\$77), mesh (\$2,600) and scaling (\$13,200).

The Government rejected the proposal by letter dated September 16, 1964 (Exhibit No. 59). Order for Changes No. 2 (Exhibit No. 3) was subsequently issued. It provided for payment for placing embankment (Bid Item 11), for specially compacting the embankment (Bid Item 16), furnishing and placing cement and reinforcing bars (Bid Items 34 and 36) and performing additional open-cut excavation (Bid Item 3), amounting to \$1,353.80, as well as ten days additional time. It also provided for a lump-sum payment of \$604.94 for forming the outside wall of the access shaft from elevation 6,016 to elevation 6,022. The sum of \$1,368 was deducted to cover a decrease of 24 cubic yards of shaft excavation, at \$57 a cubic yard, under Bid Item 7. The net amount allowed by Change Order 2 was thus \$1,411.82. Thereafter, the lump-sum payment for forming the outside wall of the access shaft was increased by \$60.06 to \$665, pursu-

ant to Findings of Fact No. 1, par. 51 (Exhibit No. 221).

In addition to appellant's contention that the Government bears the responsibility for its increased costs below, as well as above, elevation 6,016, it claims that the Government did not properly pay for the additional excavation at the top of the shaft. In appellant's view such excavation was compensable at the shaft excavation price under Bid Item 7, rather than as open-cut excavation at \$1.72 a cubic yard under Bid Item 3 (Exhibit No. 219, p. 32).

The appellant has also made several smaller claims in connection with the access shaft and shaft house problem.¹⁷⁴ It asserts that rock bolts, wire mesh, anchor bolts, and metal lath installed as safety measures to stabilize the sides of the shaft are compensable (Exhibit No. 219, p. 32). In addition, the appellant maintains it is entitled to a time extension and additional compensation for a work stoppage related to the concrete pour between elevation 6,003 and 6,011 in the shaft (Exhibit No. 51).

The latter claim arose because Government drawings for the ac-

cess shaft, revised as a result of the overexcavation, depicted the shaft wall to be double formed (with forms on the inside and outside of the concrete).¹⁷⁵ Instead of using double-forms, however, the appellant constructed the forms so as to permit the backfill concrete to be placed directly against the rock, forming only the inside shaft surface. The rock wall was thus the outside form. The work apparently was done this way because "a little extra concrete would be cheaper than the second form" (36 Tr. 3995).

On Saturday, September 12, 1964, while Mr. Daniel Nielson, the Government inspector, was checking the appellant's preparation for placing concrete from elevation 6,003 to 6,011, he noted that the form-work was not in compliance with the revised drawings. Accordingly, he withheld authorization of the proposed concrete placement until approval could be obtained for appellant's deviation from the drawings.

The parties disagree on the period of time that the work was delayed. Mr. Doak testified that the delay lasted between two and three hours (33 Tr. 3783). Mr. Nielson's report, however, shows that work was held up for one hour and five minutes, from 9:15 a.m. until 10:20 a.m. (Government Exhibit B-493). The work stoppage affected the batch plant operations and trucks as well

¹⁷⁴ One of the claims relates to payment for backfill of the overexcavation above elevation 6,005. The revised drawings incorrectly showed that concrete should be used for such backfilling (Appellant Exhibit C-53). The Government, however, had actually intended Zone 2 earth material, instead, to be placed at the contractor's expense (Appellant Exhibit C-49). The contracting officer found under the circumstances that the appellant was entitled to be compensated, and has been paid, for backfilling with concrete between elevation 6,003 and 6,011 (Exhibit No. 251, pars. 155-56).

¹⁷⁵ Exhibit Nos. 29, 29A. According to Mr. Doak, this was a departure from the "bid plan [which] showed that we could single form it or use a liner form" (33 Tr. 3779).

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as the working crew of about twelve men (33 Tr. 3784).

The appellant also contends that Mr. Lasko sought to require it to pour the concrete at Government prices as a basis for approving the deviation (33 Tr. 3782). Mr. Lasko has denied the assertion (70 Tr. 7776).

Decision

The appellant's position (as set forth on 264 of its Posthearing Brief) is that it:

* * * encountered a special problem with overbreak in the area at the top of the access shaft as a result of Bureau misrepresentation of the level of bedrock below original ground and deletion of pertinent data from the field drill report for Drill Hole 17.

As a consequence, maintains the appellant, the Government redesigned the top of the access shaft and shaft house foundation to accommodate the conditions (Posthearing Brief, 266).

The rule with respect to misrepresentation has been stated as follows in *Pacific Alaska Contractors, Inc. v. United States*, 193 Ct. Cl. 850, 863-64 (1971):

While express representations as to the nature of conditions to be encountered in contract performance are not essential to the establishment of entitlement to an equitable adjustment * * * under the standard Changed Conditions article, at least insofar as subsurface or latent conditions are concerned, there must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found in contract performance, or

to view the other side of the coin, that there were such indications which induced reasonable reliance by the successful bidder that subsurface conditions would be more favorable than those encountered. * * *

It does not appear to us that the conditions at the site were misrepresented or that the appellant should have been misled. Drill Hole 17 was located 11.91 feet toward the valley floor from the centerline of the access shaft. Near the collar of the access shaft Drill Hole 17 showed broken and weathered rock for the top 5.5 feet of bedrock.¹⁷⁶ This indicates that the surface of the bedrock is unsuitable for the foundation until the weathered portion is removed. This is essentially the condition found by the appellant in the shaft.

Appellant has alluded to the fact that certain data recorded in the Daily Drill Reports by Government drillers were deleted from the logs of Drill Hole 17. Precisely how appellant has been harmed as a result is not disclosed by the record. As provided in Paragraph 34, all samples and cores recovered in subsurface investigations and the complete logs of all holes were available to bidders. A contractor himself has a duty to be reasonably informed. His duty to know requires him to examine other available materials to which the contract documents refer him.¹⁷⁷ Even if a contractor can establish the presence of a misrepresentation, he can obtain affirma-

¹⁷⁶ Drawing 526-D-2753; 58 Tr. 6464.

¹⁷⁷ *Hunt and Willett, Inc.*, note 75, *supra*.

tive relief therefor under the Changed Conditions clause only if he shows by affirmative evidence that he was misled thereby, having first fulfilled all his obligations.¹⁷⁸

There is no evidence that the appellant availed itself of the data available. Mr. Walsh could not recall whether at the time of bidding he specifically examined the core for Drill Hole 17 (44 Tr. 4919-20). Mr. Miller was not certain that he had (21 Tr. 2403). A changed condition of the second category cannot be said to exist if a reasonable prebid investigation would have disclosed the existence of the condition which is the subject of the claim.¹⁷⁹ For the reasons stated, the claim is denied.

With respect to the funnel-shaped excavation between elevation 6,016 and 6,004, appellant contends it resulted from a changed condition in the rock found there. The Government maintains it was caused by the appellant's blasting procedures.

Substantial overbreak from blasting at the top of shafts is not unusual (Appellant Exhibit C-48). The question here is whether the appellant's drilling and blasting oper-

ations caused or contributed to the overbreak.¹⁸⁰

Blasting is considered intrinsically dangerous, mainly because it is impossible to predict with certainty the extent or severity of its consequences. On the record before us we are unable to find any overt negligence on the part of the appellant in the performance of the blasting.¹⁸¹ Nevertheless we hold that the appellant has not sustained its burden of proof.

To begin with, the appellant, in rather unorthodox fashion, excavated first upward and then started blasting downward. Through the action of its drills, the appellant knew or should have known that it was proceeding in unsound rock. Then, as described by Mr. Miller:

* * * after the shot was fired, the material loosened by the blast did not fall to the bottom of the shaft. * * * [P]ieces of material would begin to drop at the same time. And they would contact each other and form a ridge * * * with the weight of them * * * holding them against the sides of the bank * * * the side where the material that was unstable was lying. (18 Tr. 2017-18)

When certain shots failed to fire, the appellant drilled down to where the material had sunk but had not fallen away (18 Tr. 2018-19). According to Mr. Miller, some dynamite was lowered into the material and shot, in an effort to break the ridge. When it did not, a second

¹⁷⁸ *Key, Inc. & Jones Robertson, Inc.*, IBCA-690-12-67 (November 29, 1968), 68-2 BCA par. 7385, at 34,352-53. However, a finding that the contractor was actively "misled," in the sense that the Government "withheld" or "concealed" information within its grasp, is not essential to proof of a changed condition. *United Contractors v. United States*, 177 Ct. Cl. 151, 165, n. 6 (1966). Such a finding is unwarranted here.

¹⁷⁹ *Humphrey Contracting Corporation*, note 76, *supra*, 75 I.D. at 30, 68-1 BCA at 31,517.

¹⁸⁰ Under Paragraphs 49b. and 55 of the specifications, the contractor is liable for damage "done" or "caused" by its blasting.

¹⁸¹ The Government, also, does not charge the appellant with negligence in this connection (Government Posthearing Brief, 399, 400).

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shot broke the ridge and the material fell on down the shaft (18 Tr. 2019). What was left was a funnel-shaped or flared condition.

It would appear that the bridging of the material prevented it from falling to the bottom of the shaft and caused all of the explosive force of the charge being directed upward instead of both upward and downward as would have been the case if the material had broken loose and fallen into the shaft. A flared or funnel-shaped excavation is not an unlikely consequence of such a procedure.

Inasmuch as the appellant elected to undertake the blasting on a Sunday, in the absence of Government personnel, the Government was unable to offer any direct contradictory testimony on the point. A Board, however, is not required to accept uncontradicted assertions.¹⁸² The outward manifestations of the appellant's blasting operation are such as to raise considerable uncertainty concerning the skill and care with which it was undertaken.

We find that the flaring of the shaft resulted from the contractor's blasting practices and that no changed conditions were encountered in the area in question.¹⁸³

¹⁸² *James E. Rice v. United States*, 192 Ct. Cl. 903 (1970); *Sternberger v. United States*, 185 Ct. Cl. 528 (1968).

¹⁸³ *Al Johnson Construction Company and Morrison-Knudsen Company, Inc.*, IBCA-789-7-69 and IBCA-790-7-69 (September 30, 1970), 77 I.D. 127, 136, 70-2 BCA par. 8486, at 39,448 (citing *Ace Construction Company v. United States*, 185 Ct. Cl. 487, 501 (1968)).

Appellant's other contentions are without merit. The additional material which remained at the top of the shaft between 6,022 and 6,016 was not compensable at the shaft excavation price. As Mr. Miller recognized, shaft excavation is traditionally regarded as blasted shot-type work (21 Tr. 2385). In connection with this material, however, no drilling and blasting were performed. It was taken out by means of bulldozers. Therefore, payment as open cut rather than shaft excavation was appropriate.

With respect to appellant's claim that it should be compensated for rock bolts, wire mesh, anchor bolts and metal lath installed to stabilize the sides of the shaft, the appellant has not sustained its burden of proof. There is considerable uncertainty in the record regarding this matter. These materials may well have been necessitated by reason of appellant's blasting methods, for safety reasons and not for structural support. We are therefore unable to hold the Government liable.

Work Stoppage

In our opinion the act of the Government in stopping appellant in its concrete pour in the gate shaft was justified under the provisions of Clauses 9 (Material and Workmanship) and 10 (Inspection and Acceptance) of the General Provisions and Paragraph 27b. of the specifications. The contractor was in the course of deviating from the terms of the contract in connection with

the formwork. Approval of the deviation was for the benefit of the appellant. Whether the work stoppage lasted two-to-three hours, as the appellant claims, or only one hour and five minutes, as the Government claims, we regard it as reasonable. The appellant, accordingly, is entitled to no time extension. As for appellant's contention that it sustained additional costs as a result of the delay, we are of the view that they are unrecoverable, even if the Government acted unreasonably.¹⁸⁴ However, to the extent that it is a claim for damages for delay, resulting from an asserted unreasonable suspension of work, the Board is without jurisdiction and can only dismiss this aspect, in the absence of a suspension of work clause.¹⁸⁵ The alleged action of Mr. Lasko in approving the pour provided the concrete was paid for only at the unit price does not constitute duress.¹⁸⁶

Movement of "B" Line in Tunnel and Access Shaft

The appellant has alleged that in connection with the tunnel work, it planned to be able to excavate within the B-line provided for by Paragraph 55 (note 172, *supra*) with a minimum measure of overbreak beyond the "B" line if the

rock was as represented (Appellant Posthearing Reply Brief, 51). Its position was that the statement of the "B" line as being three inches outside of the "A" line constituted a representation by the Government that the rock excavation could be accomplished within that tolerance.

When it found that it was unable to do so, the appellant requested that the contracting officer exercise his authority under Paragraph 55 to move the "B" line in the tunnel and access shaft where the nature of the materials being excavated made it necessary (Exhibit Nos. 58, 91). Movement of the "B" line would result in additional pay to the contractor. Appellant's problem was that areas of rock which it had over-excavated had to be refilled with concrete.

The contracting officer found that, except in the area of the solution caverns covered under Change Order No. 3 *supra* conditions in the tunnel and access shaft did not require that the "B" line be moved (Exhibit No. 251, par. 134).

The Board upholds the contracting officer's determination. In the first place, as will hereinafter appear in our discussion of the open cut excavation claim, overbreak in connection with tunnels should have been expected. Mr. Miller testified on cross-examination that "it would be impossible to not have excavated beyond B-line" (20 Tr. 2184). As is discussed *infra* a statement of the paylines (respecting the "A" and "B" lines) does not constitute a representation respect-

¹⁸⁴ See *Leopold Morse Tailoring Company v. United States*, 187 Ct. Cl. 304 (1969), where delay of one or two days was considered *de minimis* under the circumstances of the case.

¹⁸⁵ *Allison and Haney, Inc.*, note 9, *supra*, at 31,631-32.

¹⁸⁶ See *United States Dynamics, Inc., NASA BCA No. 567-21* (April 6, 1970), 70-1 BCA par. 8228.

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ing the conditions to be encountered or that excavation could be accomplished within that tolerance.

In the second place, under Paragraph 55 the Government reserved the right to move the "A" line so as to increase the thickness of the interior lining surfaces of the tunnel and shaft if the nature of the materials being excavated make it necessary. The question is whether the lining needs to be thicker because the rock it is holding up needs the additional support that would be afforded by more concrete. The fact that the diameter of the tunnel is larger than the "B" line is irrelevant. Rock conditions must warrant a change in the "A" line, as was the case with the solution caverns at Station 12+75 *supra*.

Mr. Miller conceded that the rock in the tunnel was generally good except for several minor instances (18 Tr. 1955). In those instances the problems were corrected by use of rock bolts or steel sets for support (Exhibit X-8).

For these reasons we find that the rock was not such that a change in the "B" line was required under the terms of Paragraph 55. The claim is denied.

Alignment and Stationing

The appellant contends that there were errors and discrepancies in the Bureau's survey for alignment (as distinguished from elevation) which affected both line and dis-

tance (or stationing)¹⁸⁷ (Appellant Posthearing Brief, 311). The assertion is based mainly on the diary of Mr. Johnson, in which appear references to the fact that bulkheads forming the end of tunnel pours were not exactly on station or alignment.¹⁸⁸

Mr. Curd's tunnel alignment plat (Exhibit X-44) purports to illustrate the Government's alignment discrepancies (67 Tr. 7351). He testified that the alignment problem could account for the discrepancies between the 1963 and 1964 Bureau surveys (shown on Exhibits X-18 through X-22) if they were taken on different alignments and stationings and also for discrepancies described by Messrs. Miller and Doak in removal of tights within the tunnel and the stationing at the portals of the tunnel (43 Tr. 4785-89).

The Government's position is that Mr. Curd's tunnel alignment plat is entitled to no weight for various technical deficiencies. It asserts that any error shown in the alignment of the tunnel by Exhibit X-44 was occasioned by the manner of Mr. Curd's draftsmanship (76 Tr. 8415). With respect to the allegation that bulkheads were off station, the Government maintains that no additional expense resulted therefrom since they were not moved.

¹⁸⁷ Several incidents involving alleged Government errors in alignment and stationing at the outlet end and upstream portal outside the tunnel are discussed *infra* in the section dealing with moving and resetting steel and forms outside the tunnel.

¹⁸⁸ Appellant Exhibit C-239, pp. 111-42, 149-50.

Decision

The appellant has not sustained its burden of proof. In view of the various shortcomings inherent in Mr. Curd's tunnel alignment plat brought out on his cross-examination, such as the size and resulting accuracy of the squares on the plotting paper he used, it is entitled to scant weight.¹⁸⁹ References with respect to alignment in Inspector McShane's report indicate inaccuracy in contractor survey (Government Exhibit B-339, January 27, 1964).

The appellant has also failed to establish that it should be compensated for its stationing difficulties. The entries in Mr. Johnson's diary simply record the fact that the bulkheads were off station, but do not indicate that they were moved as a result. The inspectors' reports concerning the moving of bulkheads and forms are contained in Government Exhibit B-515. Examination thereof reveals that there were a few occasions when bulkheads were moved, but in each such case the bulkhead was moved for a reason extraneous to the stationing at the end of the pour. For the most part the bulkheads were taken out in

order to correct reinforcing steel problems. We have not been cited to any recorded instance of a form or a bulkhead being moved because it was off station.

The claim is denied.

REINFORCING STEEL IN TUNNEL, GATE CHAMBER AND ACCESS SHAFT

In its letter dated September 16, 1964 (Exhibit No. 58), summarizing its claims for reinforcing steel in the tunnel, gate chamber and access shaft, the appellant maintains it "was required to bid the steel work 'blind'." The following alleged Government abuses are then enumerated:

1. No steel drawings were supplied to builders.

2. Steel drawings submitted after bidding and contract award were detailed in excess of customary practice and in excess of what contractor was led to believe they would be.

3. Installation tolerances were so small that installation costs were far in excess of anything that could have been reasonably expected by the contractor.

(a) Contractor has been required to install steel to tolerances of twenty-five thousandths of a foot. Experienced steel erectors confirm that requiring placement within such narrow tolerances is unheard of in any other similar installation.

(b) Insistence upon placement within such fine tolerances has resulted in expensive steel revisions in prefabricated steel * * *.

4. Reinforcing steel for the gate chamber was designed with radial pieces too long to be carried through the tunnel for placement in the gate chamber.

5. Further excess costs were caused by local Bureau personnel who used retaliation

¹⁸⁹ 67 Tr. 7336-42; 76 Tr. 8417-22. Mr. Moore expressed the view that Mr. Curd's plat was an exercise of little value (76 Tr. 8421). He also criticized the manner by which Mr. Curd plotted a curve where a P.I. station is involved (69 Tr. 7550-62). By means of an example from a recognized text on surveying (Government Exhibit B-551), Mr. Moore testified as to what is regarded as the correct method (76 Tr. 8428-34). See also Government Exhibits B-538 and B-539.

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tory inspection tactics deliberately designed to run the contractor's costs up, e.g.:

(a) Bureau inspector stood by and watched steel installed and upon completion ordered it removed and re-installed.

(b) Inspectors required steel to be shot in with a level and string lines.

(c) Bureau inspection of steel placement has been delayed, meticulous and unreasonably slow.

(d) Inspection methods used have been significantly more severe and technical

than heretofore used on other Bureau tunnel jobs in the area.

Reinforcing Steel Drawings

The comparison of appellant's unit prices for furnishing and placing the various sizes of reinforcement bars with the Government engineer's estimate and the bids submitted by the other bidders is as follows:

Exhibit No. 251, paragraph 138

Bid schedule item	Government engineer estimate	Average of other bidders	Appellant's price
35. Number 5 bars and smaller-----	\$0. 14	\$0. 15	\$0. 12
36. Numbers 6 and 7 bars-----	. 13	. 14	. 12
37. Numbers 8 through 11, inclusive, bars-----	. 13	. 14	. 12

Thus there was no wide divergence between appellant's bid prices on these items and the other estimated prices.¹⁹⁰ We do not find evidence in the record to support the contention that the contractor made blind bids on the work in question.

We are also unable to find that the drawings submitted after bidding and contract award were excessively detailed. These drawings, numbered 526-D-2721 through -2729 (Appellant Exhibit C-260), were transmitted August 15, 1963 (Exhibit No. 7) pursuant to Paragraph 100 of the specifications.

¹⁹⁰ In connection with the steel reinforcing items a letter from the appellant, dated October 12, 1964 (Exhibit No. 91, p. 4) is "critical of the bidding procedure employed by the Bureau" which is said to have "violated the applicable rules * * * relating to competitive bidding in that the system of supplying information imposed a distinct disadvantage upon those bidders who have not performed work for the Bureau in this area."

Paragraph 100 (Reinforcement Bars) covers the furnishing, placement of and payment for all the reinforcement bars required for completion of the work. Subparagraph b. of Paragraph 100 specifically provides that the "Government will furnish supplemental drawings showing general reinforcement shapes, sizes and spacing."

The contracting officer found that the supplemental drawings furnished contained no more than the "normal" detail shown on reinforcing steel drawings for other Bureau projects (Exhibit No. 251, par. 137).¹⁹¹ The amount of detail appearing on the drawings related to the general requirements for rein-

¹⁹¹ It is true that customarily most of the detailing is done by the contractor (Exhibit No. 220, p. 20).

forcement shapes, sizes and spacing and does not seem excessive. In any event, the appellant has not established that the drawings were excessively detailed. Any claim based upon that assertion is denied.

Steel and Forms

The contract provided for the placement of reinforcing steel bars in the concrete structures in accordance with specified tolerances for location, shape, size and spacing. Tolerances also were specified for the concrete forms. The appellant contends that the Government required it to exceed the specified tolerances to which the concrete forms and reinforcing steel were to be placed. The appellant also maintains that the Government imposed improper steel splicing requirements in other areas. Deficiencies in Government steel design allegedly created additional difficulties.

Tolerances

Specifically the Government is said to have imposed improper tolerances for steel in the tunnel, improper tolerances for concrete outside of the tunnel, and improper tolerances for concrete in the outlet works. The respective allowable tolerances within which concrete and reinforcing steel must be placed in construction of all concrete structures are set forth in Paragraph 96 of the specifications.

The tolerances in concrete structures, except in tunnel, gate cham-

ber and access shaft linings, are contained in Subparagraph b. The tolerances for concrete tunnel, gate chamber and access shaft are set out in Subparagraph c. Subparagraph d. provides for tolerances for placing reinforcement steel, as follows:

(1) (a) Variation of protective covering (with 2-inch cover) $\frac{1}{4}$ inch (with 3-inch cover) $\frac{1}{2}$ inch.

(b) Variation from indicated spacing 1 inch.¹⁹²

The appellant asserts that inside the tunnel it was held by the Government to tolerances of less than $\frac{1}{2}$ -inch with respect to cover clearance and less than $\frac{1}{2}$ -inch with respect to spacing of both the vertical and horizontal steel bars, which were stricter than those provided for in Paragraph 96d. (33 Tr. 3762-63). With regard to concrete structures outside of the outlet works, Mr. Doak testified that the appellant was held by the Government to tolerances of "a quarter of an inch or under in all occasions" (34 Tr. 3831).

The tolerances imposed were allegedly "more stringent than those permitted under Paragraph 96b. for: 1) variation of constructed outline from linear position in plan; 2) variations of dimensions to individual structure features from established positions; 3) variation from the plumb, specified batter, or curved surfaces; and 4) variation from the level or from the grades

¹⁹² The term "cover" refers to concrete cover. The "spacing" referred to is that of the vertical and horizontal steel bars.

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indicated on the drawings in slabs, beams, etc.”¹⁹³

With respect to variation in the thickness of slabs, walls, arch sections, and similar members, governed by Paragraph 96b.(3)(b), the appellant contends that it “poured thicknesses greater than specified * * *.” It also maintains that footings “were for the most part poured to increased thicknesses” in contravention of Paragraph 96b.(4) (Appellant Posthearing Brief, 413).

In connection with the tunnel, gate chamber and shaft, appellant asserts that “in every pour [it] was held to tolerances of $\frac{1}{4}$ inch or less on departure from established alignment or established grade, even though $\frac{1}{2}$ inch was permitted” under Paragraph 96c.(1). In addition, appellant contends that it “was held to less than $\frac{1}{2}$ of 1 percent of variation from inside dimensions,” which was allowed by Paragraph 96c.(1).¹⁹⁴

Relying solely upon the provisions of Paragraph 96d., the contracting officer denied appellant’s charge. He held that “[i]n no case was the contractor required to install reinforcing steel closer than [the] specification tolerances” (Exhibit 251, par. 141). While his deci-

sion cited only Paragraph 96d., which is inapplicable to the other tolerance questions raised, we regard the contracting officer’s findings as constituting a blanket review of all the tolerance claims, in view of the unusual circumstances of this case.¹⁹⁵

At the hearing, Mr. Robert Britton, the Government’s Supervisory Concrete Inspector, testified from his own observation that he knew of no instances in which the appellant was held to any closer tolerance than required by the specifications (70 Tr. 7697). The instructions he received from Mr. Wilcox and, in his absence, from Mr. Lasko, which he in turn issued to the inspectors working under him were that in checking tolerances for installation of concrete and reinforcing steel the specifications were to be followed (70 Tr. 7696-97).

Decision

The appellant has failed to establish this claim by the requisite preponderance of the evidence. Mr. Miller, testified that the tolerances contained in the specifications were

¹⁹³ Appellant Posthearing Brief, 413, paraphrasing the provisions of Paragraph 96b. (1) (a), (1) (b), (2) (a) and (2) (b), respectively.

¹⁹⁴ Appellant Posthearing Brief, 414. Appellant concedes that it was required only to adhere to the allowable variation of $1\frac{1}{4}$ inches in total height from the plumb for access shaft provided for by 96c.(1)(d). (Appellant Posthearing Brief, 414, citing Mr. Doak’s testimony at 36 Tr. 4013-26.)

¹⁹⁵ In the event that the contracting officer did not in fact intend to pass on all of the tolerance claims, a remand thereof to the contracting officer would ordinarily be required. *Baldi Construction Engineering, Inc., IBCA-679-10-67* (April 9, 1970), 70-1 BCA par. 8230. Were this case not already in the Court of Claims, the Board would follow its customary practice. Here, however, as will hereafter appear, the Board is of the opinion that only one finding of fact can be made and remand to the contracting officer is not warranted. See *S. S. Mullen, Inc. v. United States*, 182 Ct. Cl. 1, 17 (1968).

followed.¹⁹⁶ Mr. Doak's testimony, lacking in particularity and unresponsive on cross-examination, does not support an assertion that excessive tolerances were consistently imposed (36 Tr. 4014-27). The Government's evidence is entirely to the contrary.¹⁹⁷ Moreover, under Paragraph 96a. of the specifications, the Government reserved the right to diminish the tolerances provided for therein "if such tolerances impair the structural action or operational function of a structure."

The claim is denied.

Improper Splicing

The appellant also maintains that the Government imposed improper and unreasonable steel splicing and design requirements. It allegedly was required to perform "an extensive and unplanned operation consisting of cutting, bending and splicing of pieces of steel into the

radial reinforcing steel bars in the upstream portion of the tunnel" (Appellant Posthearing Brief, 414-15). The contracting officer, however, found that the steel had been misfabricated by appellant's steel fabricator and that this necessitated the additional bending and splicing (Exhibit No. 251, par. 142). The Government's position is that Drawing No. 40-D-5586 provided for each reinforcing bar to have a lap of 24-bar diameters, but the appellant misinterpreted a dimension shown. An arrow on the drawing indicating the distance of the circumferential steel from the inside surface of the tunnel extended to the back side of the bar. The appellant concluded that the dimension measured to the back side of the bar, which is the more common industry practice (Appellant Exhibit C-159, p. 2). Note 5 to Drawing No. 40-D-5586, however, states that dimensions are to the center lines of the bars unless otherwise noted. Section b. of Paragraph 100 also provides that "measurements made in placing the bars shall be to the centerlines of the bars," unless otherwise prescribed.

The required radius of the reinforcing bars was 3 feet 3 inches. One half of the circumference of a circle formed thereby is 10 feet 3 inches. Since each reinforcing bar is to have a lap of 24 bar diameters, according to Drawing No. 40-D-5586, for No. 8 bars, this is 24 inches. Therefore, the proper length of the bar is 12 feet 3 inches (62 Tr. 6865).

Examination of the detailing sheet for this work (Government Exhibit B-449) prepared by West-

¹⁹⁶ On direct examination, Mr. Miller testified (17 Tr. 1927-28) :

"Q. (By Mr. B. C. Hart) When the Bureau * * * checked out your reinforcing steel in the gate chamber * * * what tolerances did they allow you as to the placement of steel both laterally, or horizontally, I should say on the floor and vertically?

"A. * * * I would have to look at the specs to remember.

"Q. In other words, they told you that they were measuring to the tolerances shown in the specifications.

"A. Well, I don't know if they told me that. That's what they were doing.

* * *
"Q. And in the placement of the forms, what is your recollection of the tolerances they allowed you with regard to the positioning of the forms?

"A. What was specified in the book * * *. We could look, but it was to the tolerances in the specifications."

¹⁹⁷ 16 Tr. 1782 (Mr. Lasko) ; 70 Tr. 7697 (Mr. Britton) ; 72 Tr. 8032 (Mr. Wilcox).

ern Rolling Mills, appellant's steel fabricator, reveals a reinforcing bar radius of 3 feet 3 inches, one-half circumference of 10 feet 3 inches, but a lap of 21 inches, which is 3 inches short (62 Tr. 6867). The error resulted in a total of 41.5 bar diameters being available for the two lap splices when the steel was properly positioned, instead of two splices with a minimum lap of 24 bar diameters each, as specified.

According to the appellant, however, there is no substantial difference in lap between the bar fabricated (20.75 diameters) and the bar specified (24 diameters), particularly if industry practice and customary tolerance allowances are taken into consideration (62 Tr. 6869-71). The Government required strict adherence to the specifications. As a result the contractor was required to attempt to install the steel three times before it was accepted.¹⁹⁸

The appellant also contends that the Government designed the ten long horizontal No. 8 hoop reinforcing bars for the gate chamber ceiling without provision for cutting and splicing. The hoop was made up of two bars. The diameter of the hoop was 17 feet 3 inches (61 Tr. 6790). Mr. Doak testified that the bars which were to be placed horizontally in the gate chamber were fabricated in half-circular sections of such length that they could not be brought into place through the tun-

nel (33 Tr. 3756). The bars would not pass through the rough opening for the tunnel lining of 6 foot diameter or the downstream horseshoe section rough opening of 6 feet 6 inches.¹⁹⁹ They had to be lowered through the access shaft, but before this could be done, the bars had to be straightened and elongated.

After they were lowered, further difficulties were encountered in placement because once the steel had been sprung out, it did not recover. In order to achieve the tolerances required for placement, the bars were anchored to the walls and pulled back to the proper radius (33 Tr. 3753-62). Since this had to be done in a confined area, appellant maintains that inordinate lengths of time were expended.²⁰⁰

Mr. Doman testified that in the design of the location of these bars the size of the tunnel or shaft was not considered (61 Tr. 6790). The Government admitted that the bars had been misdetailed by it and should have been in three pieces, rather than in two to form a circle (Government Posthearing Brief, 460).

The Government, however, contends that appellant's difficulties here were of its own doing. Several

¹⁹⁸ The error was corrected by making a lap of 24 bar diameters on one side and adding a 48-bar-diameter splice bar on the other side. Appellant's steel supplier furnished the necessary 48-bar-diameter splice bar (Appellant Exhibit C-159, pp. 2-3).

¹⁹⁹ Appellant Prehearing Brief, Appendix L. A No. 8 bar is one inch in diameter and its weight is 2.67 pounds per lineal foot. Since the radial pieces were approximately 29-30 feet long, they weighed 150-160 pounds. A half section weighed about 80 pounds (33 Tr. 3754-55).

²⁰⁰ An entire shift was required to carry out the task, but the work could have been done in two hours had the Government permitted additional cutting and splicing (33 Tr. 3761-62).

months prior to their use, the contractor received a drawing and the bars themselves from its supplier showing the problem (36 Tr. 3998). The Government's position is that the bars and the drawings were not examined then, and the appellant made no effort to ascertain whether any problem was, in fact, involved until immediately before the bars were needed for use. At that time, Mr. Doak and Mr. Wilcox discussed the matter and Mr. Doak was invited to submit a written request for different splicing of the bars (33 Tr. 3760; 36 Tr. 3999), but no such request was received.

Decision

We find that the steel was misfabricated by the contractor's steel fabricator. The Government is not responsible for the misfabrication.

The contract clearly provided that No. 8 bars are to have laps of 24-bar diameters and that dimensions are to the centerlines of the bars otherwise noted. There was no indication to the contrary.

Since the requirement is precisely stated in the specifications, the contracting officer did not make a change or require extra work when he insisted upon 24-bar diameters of lap. The Government's right to require strict compliance with the specifications is well-established.²⁰¹

Neither was the appellant justified in failing to comply with the specifications because the estab-

lished practice of the trade was to the contrary. Trade practice cannot override an unambiguous contract provision.²⁰²

With respect to appellant's assertion that placement of the hoop bars in the gate chamber ceiling was made more difficult by reason of Government misdetailing, we note that the appellant delayed taking the matter up with the Government until immediately before the bars were needed for use, although it had been apprised of the problem several months earlier. We find, further, that the appellant was invited by the Government to submit in writing a request for different splicing of the bars, but no such request was made, and the appellant ultimately performed the work as provided in the specifications.

We do not, however, consider that the appellant's conduct precludes it from recovering for the additional work entailed in complying with the defective splicing requirement. The Government was responsible for the misdetailing and for failing to give due consideration to the proposed location of the bars. Having created the problem, the Government may not thereafter avoid all liability therefor on account of the appellant's carelessness. The Government was on notice; it had acknowledged

²⁰¹ *R. L. Pruitt Sheet Metal Incorporated*, IBCA-560-5-66 (July 27, 1966), 66-2 BCA par. 5714.

²⁰² *S. S. Silberblatt, Inc. v. United States*, 193 Ct. Cl. 269, 288 (1970). The appellant has made no showing that the contract language, though clear and unambiguous, had a meaning different from its ordinary meaning by reason of trade custom or usage. See *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 73 I.D. 95, 100, n. 8, 66-1 BCA par. 5507, at 25,789.

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its fault; under the circumstances the appellant was not a volunteer. The appellant's action or nonaction in submitting a request for different splicing merely relates to the question of mitigation of damages, not to entitlement.

So much of the appellant's claim as pertains to the misdetailed bars is sustained. The additional compensation therefor will be treated in the discussion of the Equitable Adjustment *infra*. The remainder of the claim is denied.

Intake Structure

The appellant alleges that the Government's design of column steel for the intake structure was deficient and "caused unwarranted construction problems" (Appellant Post-hearing Brief, 420). Mr. Doak testified that the contractor was required to install the vertical steel reinforcement for the four vertical columns in single pieces 25 to 30 feet in height, contrary to industry practice (34 Tr. 3802-3). Consequently, in order to erect the steel, appellant had to build a scaffold around the intake structure for support, which thereafter had to be partially taken down and then replaced to permit placement of forms and pouring of concrete (34 Tr. 3802-3).

Mr. Doak contended that the necessity for scaffolding with its resulting expense and delay could have been eliminated if the Government had permitted appellant to cut and splice the steel just above the

floor slab. This would have enabled appellant to dowel out the slab and to use the dowels for support of the column reinforcing steel cage which could then have been made up on the ground and erected in one piece.

After the steel was in place, it was necessary to pour the concrete, containing 1½ inch aggregate, for the columns. The column steel, however, was allegedly so closely spaced as to make very difficult the placement of concrete containing the aggregate through the interstices in the steel (34 Tr. 3804-5). To get the concrete shaken down into the forms, the use of vibrators was necessary to vibrate the concrete down, through and around the steel and consolidate it into final position. This resulted in honeycombed concrete requiring extensive repair.

The appellant sought to repair the honeycombed areas by patching them with a mortar gun. It asserts that use of a mortar gun would improve the quality of the patching. The Government, however, required the appellant to repair the honeycombed condition by chipping the affected concrete and refilling it with sound concrete pursuant to Paragraph 95 (Repair of Concrete) of the specifications.

The Government's position is that the design did not permit a splice in the column steel at the location suggested by the appellant. According to Mr. Doman, who designed the structure, the portion of greatest stress in such columns is at the

floor line.²⁰³ The Government maintains that there was no assurance in the specifications or otherwise that a splice in this location would be approved (Government Posthearing Brief, 624). It points to Drawing No. 526-D-2706, on which the size and shape of the columns and a detail of the typical column reinforcement are shown. Thus, according to the Government, the appellant was on notice of the structure height and the cage of steel which would be required in the columns.

As for the question of the density of the steel mesh formation, the Government's position is that the close spacing on column steel is depicted on Drawing No. 526-D-2706, Sections B-B and A-A, showing typical beam and column reinforcing steel arrangements. The Government "concedes * * * that some difficulty could have been experienced in vibrating concrete with 1½ inch aggregate," but maintains that the appellant made no effort to utilize the procedures available under the contract to avoid the problem (Government Posthearing Brief, 631). It refers specifically to Paragraph 83b., which reads as follows:

b. Maximum size of aggregate.—The maximum size of coarse aggregate in concrete for any part of the work shall be the largest of the specified sizes, the use of which is practicable from the standpoint of satisfactory consolidation of the concrete by vibration.

²⁰³ 61 Tr. 6793-4. Mr. Doman testified on cross-examination (61 Tr. 6824):

"We would not have allowed him to splice the bars at the invert elevation because this is a point of critical stress."

Under this provision, the Government claims the appellant could have, but did not, request permission for the use of smaller size aggregate. The appellant's rejoinder is that no reduction in intake structure aggregate size was requested because an earlier similar request respecting the tunnel had been denied (Appellant Posthearing Reply Brief, 69-70).

The Government also maintains that the contractor could have utilized other contractual avenues "to minimize the difficulty in placements and reduce the possibility of the honeycombing" (Government Posthearing Brief, 631). Such options allegedly were available to the appellant through its selection of construction joints under Paragraph 112a. and detailing of steel as shown on its steel bar placing diagrams. Paragraph 112a. (Joints in Concrete) reads:

a. Construction joints.—The location of all construction joints in concrete work shall be subject to approval, and the joints shall be constructed in accordance with Paragraphs 93 and 94. * * *

Decision

The appellant has once again taken the position that a Government specification which is allegedly contrary to trade practice is not binding. As a consequence, it contends that the cost of scaffolding required for installation of the intake structure column steel should be borne by the Government, since scaffolding would not have been necessary if industry custom had been followed.

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The appellant, however, merely asserted the existence of a trade practice. This is insufficient. A trade practice must be established by clear and uncontradictory evidence.²⁰⁴

Even had a contrary trade practice been established, it cannot override an unambiguous contract provision, unless it has been shown that the seemingly clear and unambiguous language actually had a meaning different from its ordinary meaning, as we held *supra*. No such showing has been made here.

Drawing No. 526-D-2706 shows the size and shape of the columns and a detail of the typical column reinforcement. The appellant was thus on notice of the structure height and the cage of steel which would be required in the columns. We regard the contract provisions in question as clear and unambiguous. They give no indication that splicing would be permitted.

With respect to the dispute over the density of the steel mesh, we find that the appellant did not take advantage of the procedures available under the contract. The intent of Paragraph 83b. is that the largest practicable size of aggregate be used. The appellant was not justified in assuming that rejection of a change in aggregate size in an unrelated matter rendered pointless a similar request here.

It also appears that the contractor could have reduced the

honeycombing and thereby decreased the amount of concrete repair work by selecting the construction joints in accordance with Paragraph 112. By making more placements in the intake structure columns, the placing difficulties would have been minimized and the honeycombing would have decreased.

The appellant, in addition, was obligated to follow the concrete repair provisions contained in Paragraph 95. Use of a mortar gun was not specified therein. The Government was therefore entitled to reject the appellant's request to repair the honeycombed areas with a mortar gun.

The claim is denied.

Windows in Circular Tunnel Forms

In pertinent part, Subparagraph a. of Paragraph 92 (Forms) provides:

* * * Inside forms for circular tunnels, in which the tunnel linings are placed monolithically without longitudinal or horizontal construction joints, shall be constructed to cover only the arch and sides leaving the bottom 65° plus or minus 5° of the inside circumference to be placed without forming. Forms for tunnel lining shall be provided with openings of ample size for supervision, vibration and inspection. The openings shall be spaced at not more than 8 feet on centers longitudinally in each sidewall and in the crown, and shall be located at midheight of the tunnel in sidewalls and in the crown, alternately on each side of the tunnel centerline.

Paragraph 94c. of the specifications provides that the consolidation of concrete:

²⁰⁴ *General Electric Company*, note 202, *supra*, n. 9, citing *Eder Electric Co. v. United States*, 205 F. Supp. 305 (E.D. Pa. 1962).

* * * in tunnel lining invert shall be by electric- or pneumatic-drive, immersion-type vibrators. Consolidation of concrete in the sidewalls and arch of tunnel lining shall be by electric- or pneumatic-driven form vibrators supplemented where practicable by immersion-type vibrators.

The Government inspector noted in April 1964, that the forms for the circular portion of the tunnel were full circle and did not contain windows, which was a departure from the specifications. The appellant was informed that it would have to remove the invert and provide windows. It complied to the extent of removing the invert in a 4-foot tangent section in the curved portion of the tunnel.

The contractor objected to any modification of the forms and the Government's Resident Engineer granted permission for it to proceed without the windows on an experimental basis. After a trial at placing concrete lining in the upstream portion of the tunnel with the bottom 65° of the forms removed, at its request, appellant was granted permission to try a 30-foot section with the complete circumference formed without windows. The Government thereupon regarded the general appearance of the inside surface of the concrete as satisfactory, but questioned the adequacy of the consolidation of the concrete into the irregularities of the rock, particularly around the rubber waterstop where it was partially embedded in the adjoining section.²⁰⁵ The Government also de-

termined that the only type of vibration imparted to the concrete was with the form vibrators.

Consequently, appellant was requested, in lieu of the 65° invert opening, to provide a series of bottom openings approximately 15° off center on each side in addition to the other openings required under Paragraph 92a. The Government further called upon the contractor to place both the downstream and upstream openings as close as practicable to the construction joint in order to achieve adequate internal vibration around the entire length of the rubber water stop (Exhibit No. 19).

Decision

The procedure outlined by the Government is in accordance with the provisions of Paragraph 92a. The appellant was merely required to comply with the specifications.²⁰⁶ We do not perceive any reasonable basis for objection. No contractual change was effected. The claim is denied.

Cleanup Prior to Placing Concrete

The appellant contends that the cleanup of both rock and concrete surfaces required by the Government before the placing of concrete in the tunnel was oppressive. Its cleanup costs were said to run 35 percent of the bid price on the concrete. According to the contractor, two complete washdowns of the full periphery of the tunnel were required and it was necessary, also,

²⁰⁵ Exhibit No. 19; Appellant Exhibit C-159, pp. 4-5.

²⁰⁶ *Geo Prospectors, Inc.*, IBCA-549-3-66 (September 27, 1967), 67-2 BCA par. 6598.

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to wash the invert five times in order to meet the Government inspector's requirements (Appellant Exhibit C-159, p. 3).

Subparagraph d. of Paragraph 92 requires that at the time the concrete is placed in the forms, the surfaces of the forms must be "free from encrustations of mortar, grout, or other foreign material." Subparagraph b. of Paragraph 93 (Preparations for Placing) provides in pertinent part, as follows:

Immediately before placing concrete, all surfaces of foundations upon or against which the concrete is to be placed shall be free from standing water, mud, and debris. All surfaces of rock upon or against which concrete is to be placed, shall in addition to the foregoing requirements, be clean and free from oil, objectionable coatings, and loose, semi-detached, or unsound fragments. * * *

On April 24, 1964, Mr. E. W. Ryland, government engineer, observed appellant's cleanup operations. He found that the contractor did not have a waterline going into the tunnel, the waterline having been removed as soon as the tunnel excavation was completed. Seepage was occurring at a point downstream from where the cleanup was in progress and water had collected in a depression in the invert. A pump was set in this depression and a hose run to the area being cleaned. The pressure of the water as it discharged from the hose was low. Brooms were being utilized to scrub the invert, and appellant's employees were dipping buckets into the depressions to obtain water to wash the lower portion of the side-

walls. Mr. Ryland did not observe any "effort to wash the sidewalls to full height or the arch." Appellant's utilization of compressed air in the cleanup blew dirt and dirty water onto the sidewalls. The same water was used over and over again. When he left the scene it was "about the color of a rich chocolate beverage." (Appellant Exhibit C-159, pp. 3-4).

Mr. Ryland also inspected the section where the cleanup had been approved previously. He found that at no place was the rock free from a thin film, which is indicative of the use of dirty water in cleanup. There was a sprinkling of small rock fragments over the area and the depressions contained some debris. He regarded the quality of the cleanup as "strictly marginal," though adequate (Appellant Exhibit C-159, p. 4).

Decision

The Government's witnesses testified that cleanup requirements imposed on the appellant were strictly in accordance with the provisions of the specifications.²⁰⁷ It does not appear from Mr. Miller's testimony that the field requirements exceeded those provided for in the specifications.²⁰⁸ It is also clear that the final cleanup in the tunnel barely complied with the contract.

In our view, the excessive cost of cleanup is attributable to the procedures adopted by the appellant. The

²⁰⁷ Mr. Clarence W. Shelton, Government Inspector (62 Tr. 6875); Mr. Britton (70 Tr. 7697); Mr. Wilcox (72 Tr. 8033).

²⁰⁸ See 15 Tr. 1621, 20 Tr. 2252, 26 Tr. 2920.

Government is not responsible. The claim is denied.

Wet Sandblasting of Construction Joints

Under Paragraph 93c. of the specifications, the surfaces of construction joints are required to be wet sandblasted. Contraction joints, however, need not be wet sandblasted.²⁰⁹

The appellant contended²¹⁰ that sandblasting was not required at what it termed "a cold joint," where a water stop is used to connect the concrete to make it water tight.²¹¹ Such a joint would have the effect of a contraction joint (35 Tr. 3968). It would also serve as a construction joint (35 Tr. 3973). Appellant maintains that sandblasting is unnecessary where a joint performs a dual function.

The Government, however, required that every such joint be sandblasted (33 Tr. 3706-7). Mr. Rich-

²⁰⁹ Tunnel construction joints are referred to in Drawing 526-D-2702 (Exhibit X-2). The difference between the two types of joint is found on Drawings 40-D-5530 and 40-D-5586.

²¹⁰ Although considerable attention was devoted by the appellant to the matter at the hearing and pre-hearing stages of this appeal, its Posthearing Brief does not provide commensurate treatment. It well may be that the claim was abandoned.

²¹¹ 33 Tr. 3701, 3713. A cold joint is one which while tight in hot weather might during cold weather have an eighth or a sixteenth of an inch gap through which water could leak out and harm the tunnel. A water stop is, in this case, a six-inch piece of rubber about a quarter of an inch thick, having a dumbbell stop to prevent water from traveling through and around the ends (33 Tr. 3703-5). The purpose of the water stop is to provide an expansion joint (33 Tr. 3706). Sandblasting is done for the sole purpose of bonding the joints. It is, according to Mr. Doak, "the only way you can get a real good water tight joint" (33 Tr. 3712).

ard Whinnerah, who participated in the design of the tunnel, testified that the "rubber water-stop was put in the construction joints to further guarantee against leakage through the joints" (60 Tr. 6675).

This, according to the appellant, adversely affected its work and cleanup because the sandblasting equipment is heavy and hard to handle (33 Tr. 3707-9). Moreover, these joints occurred every thirty feet in the tunnel and numbered perhaps forty (33 Tr. 3712). In some instances they had to be sandblasted more than once (33 Tr. 3713).

Decision

The contract provides that both sandblasting and water stops are necessary with respect to construction joints in the tunnel. The presence of a water stop may be indicative of a contraction joint, but an existing construction joint is no less a construction joint because a water stop is added to it.

In calling for both sandblasting and water stops the Government was, in Mr. Whinnerah's words, requiring both "belt and suspenders" (60 Tr. 6675). The Government may have been excessively cautious, but this does not entitle the contractor or the Board to ignore the plain meaning of the contract. The claim is denied.

Moving and Resetting of Reinforcement Steel and Forms

Concreting of the tunnel commenced in January 1964 and was

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completed in June 1964.²¹² The appellant contends that the Government required it "constantly to move or rebend reinforcing steel and to relocate forms," which constituted extra work, as a result of Bureau changes in surveys. This allegedly occurred both inside and outside the tunnel. The Government admits that two of its benchmarks had erroneous elevations, but maintains that appellant itself was responsible for its extra expense. The difficulties started around the time of the first concrete pour in the tunnel in the area of the gate chamber on January 3, 1964 (24 Tr. 2714).

Inside the Tunnel

The first five placements in the tunnel involved three placements downstream and two placements upstream from the gate chamber. The tunnel section below the gate chamber has a horseshoe shape with a round top and relatively flat bottom, with an invert peaked up in the fashion of an inverted "V".²¹³ Installed in both the invert and the arch are two mats of reinforcing steel to be placed to tolerances of $\frac{1}{2}$ inch (with respect to the 3-inch depth of cover) and 1 inch (as to spacing), pursuant to Paragraph 96d.

Under the contract the upstream sections are to be circular in nature and poured monolithically (full circle all at one time). Two mats of

reinforcing steel are to be installed in the upstream pours.²¹⁴ The downstream pours are to be done in two sections, the invert (or floor) first and the arch (or horseshoe) second.

The first pour was between Station 9+86 and Station 10+23 (which included all of the first stage concrete in the gate chamber, between Station 9+86 and Station 10+09, and the invert between Station 10+09 and Station 10+23). This portion of the pour involved the splitter or "fin" wall. Inasmuch as the floor of the surface of the concrete between the outside edges and the splitter wall changes from a flat shape to the inverted "V" shape, as well as a vertical curve, running from a point below Station 10+09 through Station 10+23, it entails a rather difficult amount of concrete forming.²¹⁵

Mr. Doak testified with regard to the first concrete pour that after second stage concrete had been poured on top of the initial concrete in the gate chamber section, the appellant was required to chip out the concrete on either side of the splitter wall between Station 10+09 and 10+23 and replace it to a different elevation. According to Mr. Doak, there was a difference in the elevation between the second stage concrete and the section commencing at Station 10+09, and Bureau engineers told him that the concrete had to be removed and replaced as it was too low and had to be put into a

²¹² The dates of placement are shown on Government Exhibit B-535.

²¹³ See Section B-B, Drawing No. 526-D-2702, Exhibit X-2.

²¹⁴ See Section A-A, Drawing No. 526-D-2702, Exhibit X-2.

²¹⁵ See Drawing No. 526-D-2707.

new and higher elevation (34 Tr. 3863-64). This work took approximately one week.

The Government maintains that the corrective work as to this pour was necessary for several reasons. It cites conflicts in Mr. Miller's testimony. He testified initially that he had made the survey from upstream control which were "the only ones we had" (15 Tr. 1620). Then he said that a Bureau check of the pour before concrete was placed showed that the steel and forms were placed high and had to be lowered (17 Tr. 1936). But during cross-examination, when his diary entry (Appellant Exhibit C-104, p. 48) was noted showing that he had used two completely different points for control (one from the top of the shaft and the other from the outlet end), he conceded that his earlier testimony had been in error.²¹⁶

There is conflicting evidence in the record as to whether the Bureau did in fact check out the first pour in the tunnel. Mr. Wilcox's diary (Appellant Exhibit C-246, p. 294) contains an entry that Mr. Lasko had "refused to allow the surveyors to check out forms and screed grades" since underground surveys were the contractor's responsibility.

Mr. Lasko, however, testified that the vertical curve between Station 10+09 and 10+23 had not been correctly installed before the pour, but that Mr. Miller had requested permission to pour anyway and correct

it later. He indicated that the Bureau had checked the pour and that all except the vertical curve checked out correctly. He also said that he thought the vertical curve error was 0.1 foot high and low before the pour.²¹⁷ Mr. Miller stated that when he checked out the pour prior to placement of concrete, both ends were correct but that the area in between was out of tolerance (26 Tr. 2974-75).

According to Mr. Wilcox's diary (Appellant Exhibit C-246, pp. 295-96), Mr. Miller had asked for Government curve computations so "he could make a closer check." Mr. Wilcox indicated that he said Mr. Miller "should let us have his computations to check against ours." The diary entry further notes that Mr. Miller "admitted that he has never computed the curves so he doesn't know how close the concrete is to being on grade."

Another reason that the Government found this work unacceptable involved the absence of a concrete finisher. According to the Government, this placement began at about 3:30 p.m., on January 3 and was finished at 2 a.m. on January 4, but no concrete finisher arrived on the job until January 9 or 10.²¹⁸ Mr. Shelton testified that the concrete in the floor between the splitter wall and both sidewalls was not in compliance with specification tolerances as to smoothness (62 Tr. 6885).

²¹⁶ 20 Tr. 2223. Bureau records indicated that the appellant used control from outside each portal (Government Exhibit B-303, p. 131).

²¹⁷ 24 Tr. 2712-15, 2735; 25 Tr. 2803.

²¹⁸ 62 Tr. 6881, 6886; Appellant Exhibit C-246, p. 294; Government Exhibit B-303, p. 187.

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Thereafter, the contractor was required to take out and replace the concrete between the splitter wall and each sidewall because of the uneven finish. This corrective work, which was performed in June and July 1964, entailed removing and replacing the concrete down to a point $1\frac{1}{2}$ inches below the steel (Government Exhibit B-303, p. 299). The Government's position is that the extra expense of chipping out and replacing the concrete was appellant's responsibility.

The appellant's major contention appears to be that the gate chamber steel difficulties resulted from the error in Temporary Benchmark No. 6 (Appellant Posthearing Brief, 285-89). It maintains that:

* * * the Bureau used TBM No. 6 to check out the contractor in the gate chamber and as a result of an elevation error on TBM No. 6 (not discovered until a later time) [219] the Bureau mistakenly thought that the initial gate chamber elevation was too high and then required the contractor to place the gate chamber floor (which was poured on January 3) approximately two-tenths of a foot too low. (Appellant Posthearing Brief, 289-90.)

The appellant relies on the following entry by Mr. Miller in its diary for December 28, 1963 (Appellant Exhibit C-104, p. 43):

Yesterday the Bureau found an error in their benchmark controlling the tunnel. It is my understanding that it was high, which means that all of our tunnel operations are high throughout. We'll have to discuss this with the Bureau as

it involves some yardage in both excavation and concrete.

The Government's position is that the error in Temporary Benchmark No. 6 was not the error Mr. Miller was referring to, since he testified that he was referring to the error in temporary benchmark C outside the tunnel (21 Tr. 2304). It also points out that Mr. Miller's diary entry was made on December 28, 1963, but the error in TBM 6 was not discovered until January 10, 1964.

The Government contends that the appellant's problem was not due to the survey but was related to a jurisdictional dispute between labor unions which led to faulty work that had to be redone.²²⁰ It maintains that Mr. Miller's diary entry that the gate chamber work was "high" because of "high" Bureau survey is simply wrong, since if either Temporary Benchmark C or 6 were high and if the steel, concrete or forms had been set from either of them, it would have been set low rather than high and would have to be raised rather than lowered (Government Posthearing Brief, 435).

The Government takes the position that the pour between Station 10+09 and Station 10+23 was unacceptable for two reasons. First, it relies on Mr. Miller's diary entry (Appellant Exhibit C-104, p. 55) in which he noted that the concrete at Station 10+09 at the base of the fin wall is approximately one inch below elevation and approximately one inch above elevation at Station

²¹⁹ Temporary Benchmark No. 6 had an elevation that was 0.19 foot high (Appellant Exhibit C-103). The error was discovered on January 10, 1964.

²²⁰ Appellant Exhibit C-104, p. 37, 39; 20 Tr. 2207.

10+23. Second, the Government refers to the improperly finished concrete surface resulting from the absence of a finisher, as described above.

The next incident alleged involved the second concrete pour and steel and forms between Station 10+23 and Station 10+53. When the steel and forms for the next pour downstream were checked by the Bureau, the steel was found to be 0.5 foot too low.²²¹ The contractor claims this was due to the Government's use of Temporary Benchmark 6 which was concededly erroneous by 0.2 foot.

The appellant was required, as a consequence, to bend the steel bars projecting from the existing concrete up to the proper elevation. As the bars could not be bent upwards $\frac{1}{2}$ foot, the appellant shifted the mat with jacks (26 Tr. 2962-63). The appellant gave no indication of the amount of delay entailed by the corrective work or of the cost thereof.

The Government's position is that the error was not caused by the error in Temporary Benchmark No. 6. It maintains that in this case the contractor took as its control a point on the splitter wall, or fin wall, downstream of exact elevation (17 Tr. 1938). The Government also refers to Mr. Miller's diary entry for January 20, 1964 (Appellant Exhibit C-104, p. 59) in which he complained about poor survey work by the appellant's crew.

The main thrust of the Govern-

ment's position is that Temporary Benchmark 6 could not have been responsible here because that error was 0.2 foot and the error here was 0.5 foot. The Government cites its Exhibits B-540-B-546 which pertain to a tunnel survey made by the Bureau in 1968. When the appellant objected to the admissibility of these exhibits, the hearing official received them subject to the ruling of the Board.²²²

The appellant maintains that the survey is inadmissible since it was performed after the work was completed and after the hearing of this appeal had begun and not in the presence of a representative of the contractor. The appellant's position is that the survey is not reliable because it was performed by Bureau personnel who were *ipso facto* biased.

The Government had the survey taken as a check against the use of a possible similar survey by the appellant. The opportunity to perform a tunnel survey was afforded by the Government to the appellant in the course of the hearing (24 Tr. 2732-34). The fact that the contractor failed to do so or was not called upon to participate has no bearing on the question.²²³

²²² 76 Tr. 8449, 8459. The oral arguments of both parties and the subsequent offer of proof by the Government are found at 76 Tr. 8439-8501.

²²³ In this context, the Government has pointed out that Exhibits C-206 through C-208 are evidence of a pre-trial experiment performed by the appellant without the presence of Government representatives strictly for litigation purposes concerning the springing capabilities of No. 9 hoop bars similar to those installed in the tunnel gate chamber (76 Tr. 8453; Government Memorandum Brief on Evidentiary Matters, 16).

²²¹ Government Exhibit B-339, pp. 3, 4 (January 7 and January 13, 1964).

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There is no inherent objection to surveys or photographs that are taken after the subject matter of the litigation has been closed, providing that a substantial identity between the conditions which actually existed at the time the controversy arose and the conditions at the subsequent time has been established. Mr. Moore, who supervised and participated in the 1968 survey, testified with respect to the survey procedures he followed and the conditions he observed. As shown on the survey notes (Government Exhibit B-542), the beginning point for the 1968 survey was identical to the beginning point which established control for the 1964 surveys of concrete and steel. We find that a substantial identity of conditions was established. We therefore hold that Government Exhibits B-540-B-546 are admissible into evidence.

Examination of Government Exhibits B-540-546 and B-550-552 show that the concrete was installed within specification tolerances, but that the reinforcing steel at the joint between the second concrete pour and first concrete pour at Station 10+23 was low by approximately 0.13 foot.²²⁴

We are unable to find any connection between the error in Temporary Benchmark 6 and the error relating to the low steel between Stations 10+23 and 10+56.

The next incident involved steel and forms placed in the latter part

of January 1964 in the section extending from Station 9+73 to Station 9+86 where the gate chamber changes into the circular tunnel shape of the upstream portion, known as the transition section. Mr. Miller testified that he was told that the steel, forms, tunnel and floor were too high (15 Tr. 1620-21). It also appears that there were tightness in the bottom of the tunnel and that one row of steel was taken out so that the tightness could be removed.²²⁵ The appellant has not clearly indicated how the Government was responsible for these problems.

The Government's position is that the appellant's steel fabricator was responsible for its difficulties here in that it supplied steel which was not properly bent (Government Post-hearing Brief, 441). The Government also maintains that the error in Temporary Benchmark 6 could not have been the cause, since it was noted and corrected on January 10, 1964, before the steel work here commenced.²²⁶ In this connection, the Government also cites Mr. Miller's testimony referred to *supra* that he used the elevation off of the fin wall to check this concrete pour, and points out that the 1968 survey (Government Exhibit B-551) shows that the elevation of the benchmark on the fin wall is correct.

It does appear that the steel supplied by appellant's fabricator did not bend properly, so that new steel had to be obtained, bent, retied and

²²⁴ This is less than the admitted 0.2 foot error in Temporary Benchmark No. 6, but more than tolerance allowed of $\frac{1}{2}$ inch (or 0.042 foot).

²²⁵ 20 Tr. 2236; Government Exhibit B-303 (January 21, 1964), p. 143.

²²⁶ Government Exhibit B-303 (January 23, 1964), p. 144.

repositioned.²²⁷ There is also no evidence in the record of any improper benchmarks in existence at the time this work was being performed. In addition, it would seem that if the tunnel had been constructed from the high elevation of Temporary Benchmark No. 6, the top of the tunnel, rather than the bottom, would have been tight.

Mr. Doak testified with respect to two instances of extra work outside the tunnel proper in which alleged stringent tolerance requirements imposed by the Government necessitated movement of the forms and reinforcing steel after they had been installed. These involved the last pours on each end of the tunnel and the appellant has characterized them as stationing and alignment problems.

The first incident (which was described in appellant's dairy, Exhibit C-104) occurred on June 5, 1964, at the south end or outlet end of the tunnel at Station 14+36 (37 Tr. 4134). Mr. Doak testified that "most of" the bulkhead had to be torn out and rebuilt to a new location after it had been set to the Government-survey points (34 Tr. 3860-61). According to Mr. Doak, on resurvey it was found that the Bureau's stationing was "off somewhere between a half and three-quarters of an inch."

The Government, however, denies that the bulkhead had to be moved because of the imposition of excessively stringent tolerances or be-

cause of surveying discrepancies by it. The Government maintains that the extra work of moving the bulkhead resulted from the contractor's failure to install it properly.²²⁸

The second instance testified to by Mr. Doak referred to a concrete pour outside of the upstream end of the tunnel at Station 4+25 that occurred about June 27, 1964. He stated that he had set a bulkhead "to a point the Bureau had given," but when Bureau surveyors came "back to check out the bulkhead, they said that we were off approximately one and three-eighths inches" (34 Tr. 3862). According to Mr. Doak, the appellant found that there was a 1 $\frac{3}{8}$ -inch difference between "the original stationing that the Bureau brought in" and the subsequent station (34 Tr. 3862-63). Mr. Goldie Carlyle, the Bureau survey party chief, told him to use the original station.

The Government's position is that the measurement error in setting the bulkhead was the fault of the contractor. It relies on Mr. Doak's admission on cross-examination in which he testified that it was "the

²²⁸ The Government relies on Mr. Doak's testimony on cross-examination (37 Tr. 4134-35):

A. * * * I recall that we had a little trouble at the time on it being plumb but if I recall the situation * * * we got it back within approximately a half an inch from station * * *.

* * * * *

"Q. Would plumbing a form affect stationing?"

"A. Well, that is according to whether you are plumbing from the top down or the bottom up. * * * [T]he stationing was on the floor so that means that the top could have been on station and the bottom could have been off from station."

²²⁷ 20 Tr. 2243; Appellant Exhibit C-104 (January 28, 1964), p. 65 and (February 4, 1964) p. 70; Government Exhibit B-303 (February 3, 4, 14, and 17, 1964).

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responsibility of the carpenter foreman to see that the bulkhead was set in the right place" (36 Tr. 4009-10).

Decision

The appellant has not sustained its burden of proof. No causative connection between the existence of erroneous temporary benchmarks and the difficulties appellant encountered has been established.

In connection with the first placement, between Stations 9+86 and 10+23, the surface of the concrete was both high in part and low in part. TBM No. 6 could not have been the source of this anomaly. Moreover, Mr. Miller testified on different occasions that the appellant had utilized three separate controls.²²⁹

It also appears that appellant's failure to have a concrete finisher present resulted in an uneven finish. The extra expense of chipping the uneven concrete out and replacing it was therefore appellant's responsibility.

Appellant's own records indicate that the reinforcing steel connected with this placement had to be removed and redone on two occasions because the iron workers had misinstalled the steel (Appellant Exhibit C-104, p. 39). In this context, it is pertinent to note Mr. Doak's statement on cross-examination that he had several iron foremen re-

placed on account of their responsibility for improper placement of steel (37 Tr. 4136-37).

With respect to the second tunnel pour, between Stations 10+23 and 10+53, the reinforcing steel was found to be six inches low. The error in TBM No. 6 was 0.2 feet. Therefore, the difficulty with the low reinforcing steel was almost three times the error in TBM No. 6.

Mr. Doak, however, expressed the opinion that because of the overly high elevation on TBM No. 6, the appellant had been required to pour the concrete in the invert placement between Stations 10+09 and 10+23 too low and the Bureau raised the grade of the concrete from a point 0.2 feet low back up to grade in small increments (36 Tr. 4018; 37 Tr. 4129). In support of this allegation, Mr. Doak referred to an incident which occurred on May 2, 1964, when he reported that a pour made was delayed three hours because of "high steel" at Station 11+73 to Station 12+03.²³⁰

It appears, however, from the 1968 survey of reinforcing steel and of the concrete surface at Stations 10+23 and 10+53, immediately downstream from the splitter wall, that, with the exception of the top of the splitter wall which was 0.16 foot high, all of the concrete downstream from the gate chamber is

²²⁹ 15 Tr. 1620; 17 Tr. 1936; 20 Tr. 2223. Mr. Miller testified at one point that he could have used TBM No. 6 or others further downstream but which one would be only a guess on his part (26 Tr. 2927, 2932).

²³⁰ Other instances of "high steel" occurred on May 9, May 13, May 19, and May 28, 1964. It would seem that if the Bureau had, in fact, been endeavoring to raise the grade surreptitiously it would not have started at Station 11+73, but with the placements between Station 10+23 and 10+53.

within the specification tolerances as it was installed (Government Exhibit B-551). It would therefore seem that Mr. Doak's assertion that the reinforcing steel was consistently caused to be high by the Government in the downstream portion of the tunnel is in error.

The 1968 survey showing that the concrete and reinforcing steel are beyond specification tolerances relates to the top of the splitter wall (which is high) and the reinforcing steel in the placement upstream of Station 10+23 (which is low). However, in these instances the Government did not require the appellant to redo the work.

As for the third placement in the tunnel, the appellant had difficulty placing the steel and installing prefabricated forms. The appellant did not establish that the Government was responsible.

The appellant also did not sustain its burden of proof in connection with the fourth pour in the tunnel, between Station 9+73 and 9+86. The reinforcing steel had not been properly fabricated by appellant's subcontractor. Appellant had to correct tightness in the bottom of the tunnel. Had either TBM C or TBM 6 been responsible, the tightness would have been in the top of the tunnel rather than the bottom. Moreover, both erroneous temporary benchmarks had been corrected before placement of the steel here had commenced. In addition, Mr. Miller testified that the appellant had relied on the elevation off of the fin wall to check this pour and the 1968 survey established that the

elevation of the benchmark on that wall was correct.

The appellant has also not established the Government's responsibility for movement and resetting of the steel and forms after original installation outside of the tunnel. It appears that the bulkhead at the outlet end of the tunnel at Station 14+36 had to be torn out and rebuilt because it had been installed "out of plumb" and not because of any surveying discrepancies or excessively stringent tolerances imposed by the Government. The extra work required of appellant with respect to the bulkhead at Station 4+25 was off $1\frac{3}{8}$ inch because of the appellant's measurement error and not as a result of Government action.

The claim in its entirety is denied.

Anchor Bars in the Spillway

Although a considerable amount of testimony was elicited in the appellant's case concerning the matter of tolerances relating to anchor bars in the spillway floor slab which extended 8 feet into the rock, no subsequent mention of the matter appears in its Posthearing and Reply Briefs.

The Government specifically alluded to the appellant's failure to pursue this claim at 633 of its Posthearing Brief. It may be that the appellant has elected to abandon the claim, since it failed to respond to the Government's assertion.

In any event, the appellant has not sustained its burden of proof. It appears to us that the Government

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adequately demonstrated that the tolerances to which these bars were required to be installed were in accordance with the specifications and were necessary to provide proper concrete cover and to meet the bonding requirements for the steel; that accurate elevations on the top of these bars were of benefit to the appellant since they held up its top mat of slab steel; that the contractor was permitted to order its anchor bars in variations in length of six inches and payment was made accordingly; and that appellant was permitted to drill holes in the rock deeper than required and to install only to the depth specified.

We therefore hold that the tolerances required for these anchor bars were in accordance with the specifications. We also find that the appellant's allegations of additional work in excess of that required under the contract are not substantiated.

The claim is denied.

OPEN CUT EXCAVATION

Under Paragraph 52, Bid Item No. 3 (Excavation, in open cut for spillway and outlet works), in the estimated²³¹ amount of 119,000 cubic yards:

* * * includes all excavation including stripping, performed by open-cut excavation methods for the following:

a. Spillway and outlet works structures, including cutoffs and drains.

b. Outlet works approach channel.

²³¹ Subparagraph 18a. provides that the quantities stated in the schedule are estimated.

c. Spillway and outlet works outlet channels.

The appellant has alleged that it was obliged to perform a large volume of extra open cut excavation in rock both at the upstream and downstream tunnel face, in the spillway and at the discharge and of the tunnel and stilling basin.²³² In addition, appellant claims it is entitled to measurement of and payment on an as-built basis for clay that it was ordered to remove in areas where suitable rock was anticipated and for unstable rock and clay it had to replace with concrete (Exhibit No. 47). It contends that the Government is responsible because:

a. Bureau pre-construction geological studies and subsurface explorations used in design reported erroneously that materials in open cut excavation were essentially and consistently stable.

b. Pre-construction information on excessively unstable conditions was withheld from the contractor.

c. Bureau plans and specifications misrepresented subsurface conditions in open cut and misled the Contractor to expect that excavation in open cut could be reasonably accomplished by conventional methods and that materials would stand at designed lines and grades.

d. In actual excavation the Contractor encountered unanticipated solution caverns, faults, shear zones, clay seams and other unstable and erratic conditions.

²³² Exhibit Nos. 47 (September 10, 1964), 87 (October 7, 1964), 132 (February 12, 1965), and 147 (March 18, 1965). In Exhibit No. 147, appellant also makes an oblique reference to the design of the structures in open cut and at the hearing it introduced certain pre-1963 studies pertaining to the design of the outlet works and spillway (Appellant Exhibits C-16, C-18, C-24 and C-25). It is our impression that the appellant no longer intends to pursue this matter.

e. The undisclosed, undependable, and excessively unstable subsurface conditions caused unavoidable overbreak (and underbreak), (unplanned additional excavation operations and use of more difficult excavation methods than planned. The conditions also made preparation for concrete (e.g., cleanup) excessively tedious and difficult. (Appellant Posthearing Brief, 322-23.)

The Government asserts that there were no changes or changed conditions with respect to open cut excavation, with the exception of the fault or shear zone across the spillway at Station 6+95, responsibility for which was recognized by it in Change Order No. 3 and the chain link fence provisions of Change Order No. 4 (Government Posthearing Brief, 508).

Upstream Tunnel Inlet Portal

The appellant commenced the open cut excavation for the upstream inlet portal about August 15, 1963, soon after contract performance began. Mr. Miller testified that the contractor encountered substantial areas of unstable material on each side of the specified lines at that location. This unstable material allegedly would not stand to the lines which had been staked. Mr. Miller suggested to Mr. Wilcox that the contractor be allowed to shoot the material (marked "A" on the left-hand side of Exhibit X-16) instead of letting it fall off.²³³ A somewhat similar situation was encountered as to the material on the

right side (marked "B" on Exhibit X-16), except that there the appellant first loosened the material and forced it to fall by hand-scaling methods before shooting it on the lower portion (14 Tr. 1557-58). Mr. Wilcox approved the method utilized upon the understanding that the appellant would be paid at the same unit price as the rest of the open cut for the unstable material removed from outside of the originally staked lines (14 Tr. 1557).

The Government, however, did not have original ground cross-sections outside of the confines of the staking (14 Tr. 1560) and was unable to measure the scaled off material that would not stand to grade. Appellant received no payment for that excavation (12 Tr. 1327-28).

Appellant contends that the Government required additional work at the upstream portal. Although at first it had acquiesced in certain sloping created by appellant's upstream portal excavation which was within the staked lines (12 Tr. 1321), thereafter in June 1964, appellant was called upon to return equipment to that location and to perform substantial additional excavation (34 Tr. 3834). Appellant intimates that this occurred as a result of the Government's tunnel stationing discrepancies, following the Government's extension of stationing from within the tunnel to a location outside of the upstream portal (Appellant Posthearing Brief, 341-42). Moreover, according to Mr. Doak, this additional open cut work had to be per-

²³³ 14 Tr. 1556-57. Exhibit X-16 is a sketch portraying the excavation behind the inlet portal facing the tunnel looking downstream (14 Tr. 1552).

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formed in an area where it had already tunnelled through the rock (34 Tr. 3834). After that had been done, the excavation did not come right out on the neat line where the tunnel concrete ended, but it was necessary to bring it out "by formed concrete to the intake structure."

On cross-examination, Mr. Doak complained that here the appellant was "up against the obstacle of rock being too tight on both sides" and it "had to pull forms * * * and go in and cut both sides of the portal" (36 Tr. 4075-76). In addition, "there was clay leaning on this rock that had to be removed and there was also clay on the base area in front of the portal" (36 Tr. 4076).

Downstream Tunnel Outlet Portal

According to the appellant, excavation for the downstream tunnel outlet portal was characterized by problems similar to those at the upstream inlet portal. Its open cut operation at the downstream portal commenced about the same time as the upstream portal open cut excavation began. Its blasting crews encountered difficulties due to shear zones and unstable material. One large unstable area was a mud seam that crossed both the spillway area and the area for excavation of the downstream portal face.²³⁴ Mr. Wilcox agreed that such a "fault seam" extended across the spillway and outlet works and "caused the terrific overbreak in the open excavation

for the outlet portal of the tunnel."²³⁵

Another area of unstable material occurred at the upper reaches of the spillway toward the top of the excavation for the portal face. Appellant was unable to hold the material to the line shown on Section C-C of the Drawing 526-D-2702 (Exhibit X-2) (19 Tr. 2071-72).

At the downstream portal open cut appellant found material that "varied from a bad side of gravel on the upper left-hand side facing the tunnel to rock varying in hardnesses and also with several shear zones in them" (34 Tr. 3835). Some of this material had to be moved by blasting and some by bulldozing.

Excavation for Spillway and Stilling Basins

Shortly before the excavation of the downstream portal was completed the contractor used bulldozers and scrapers to excavate the overburden material on the spillway (19 Tr. 2071). After the downstream portal excavation was completed and the portal exposed, its drilling and blasting equipment were moved up into the spillway area.

In the spring of 1964 the appellant resumed open cut operations at the top of the spillway. It began encountering the adverse geological conditions which were allegedly undisclosed by the Government. When excavation from Station 0+00 to 3+80, for the spillway, was completed from natural ground down to

²³⁴ 19 Tr. 2066; Appellant Exhibit Nos. C-115, C-116, and C-117.

²³⁵ 80 Tr. 8995; Government Exhibit B-302 (October 30, 1963).

elevation 6,022, very little bedrock was exposed at the 6,022 level (Government Exhibit B-303 (May 9, 1964)). Spillway excavation on the uphill slope reached elevation 6,006 before hitting bedrock and this rock was "badly decomposed" (Government Exhibit B-303 (May 13, 1964)).

While drill holes DH 1 and DH 17 allegedly indicated that bedrock would be found at about elevation 6,010-6,014, appellant claims it was not hit until elevation 6,006 in the bottom of the cut. Along the left side of the spillway cut it was found at 6,022, as shown on the log of DH 17. Instead of sloping upward as would normally be expected, the rock slopes downward toward the right side and a sharp bedrock ridge was found to parallel the face of the abutment (Appellant Exhibit C-263).

On one occasion the cleanup crew on the spillway broke into several small cavities on the right side at the toe of the cut slope approximately opposite Station 2+73. The cavities were in one of the several mud seams that crossed the upper reach of the spillway. The largest such cavity was about one foot in diameter and was visible for a depth of less than two feet.

The appellant also contends, at 348 of its Posthearing Brief, that throughout the course of the open cut excavation for the spillway and stilling basins it "encountered material at presumed final lines and

grades which was significantly unstable and incapable of standing to the specified lines and grades." It refers to certain notations appearing on the Bureau's post-excavation drawings (Appellant Exhibits C-91 and C-92) showing solution caverns at Stations 2+59 and 2+79, a shear zone between Stations 3+20 and 3+40, a change of attitude in bedding at Station 5+20, and extremely deformed rock between Stations 6+90 and 8+10, believed to be a fault zone.²³⁵

Appellant contends, moreover, that due to its inferior quality the rock was prevented from standing to the designated lines and grades and that its blasting procedures were not responsible for any of the overbreak in open cut. According to Mr. Angel, it is difficult to overblast in unstable rock because the explosive is dissipated. To him the problem "was that the poor rock was difficult to make stand at almost any slope, especially the slope that the Bureau staked it for" (39 Tr. 4354-55). Mr. Angel's statement regarding Bureau staking refers to the Government's erroneous staking of the overburden on the right side of the spillway on a 1:1 slope rather than a 1½:1 slope as specified.

In addition to having its open cut operations "completely emasculated" by reason of the unantici-

²³⁵ Appellant Exhibits C-150-155, C-157-158 and C-161-161A and Government Exhibits B-328-9, B-364-5, B-423-6, and B-428-36, depict unstable and uneven rock surfaces, as affected by the solution caverns, faults, shear zones and clay seams.

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pated geological conditions and, apart from the overbreak in the unstable material, appellant alleges that "repeated removal of constantly loosening²³⁷ unstable material * * * was relentlessly required by the Bureau" (Appellant Posthearing Brief, 350). Thus appellant claims that on July 21, 1964, it was required to scale the side of the portal which it had done previously on March 10, 1964.²³⁸ On the sloped portion of the spillway "continuously" bedding gravel is said to have required several scalings without reference to what the neat line design called for (34 Tr. 3838). In addition, "constant" increases in excavation and concrete backfill were allegedly necessitated by the "excessively" unstable material, and cleanup of loose material became an "unending cycle."²³⁹ Falling material also posed a problem for the appellant (34 Tr. 3836-38).

In the stilling basin area of the outlet works and in the stilling basin for the spillway, appellant encountered beds of clay and gravel which it had to remove to get down to suitable material (34 Tr. 3840-41, 3846). In the process it had to go beyond the lines staked for excavation. Where the excavation went below

the planned grade, appellant had to backfill the areas with concrete.²⁴⁰ The depth of those holes beyond planned excavation was upwards of two feet. According to Mr. Doak, the cause of the additional depth of excavation beyond specified lines in the stilling basins was not due to the appellant's drilling and blasting procedures, but resulted from "clay slips and soft rock and semi-rock slides within the area of the foundation" (35 Tr. 3897).

Particularly in the area where "a bad clay slip" was present, the Bureau allegedly subjected appellant to "unreasonable and repeated" cleanup of loose material.²⁴¹ According to Mr. Doak, when appellant attempted to clean the rock prior to the concrete pours, the rock would shatter and require more cleanup (36 Tr. 4030).

Finally, the appellant contends that its open cut excavation work was hampered by the Government's actions and omissions affecting the core trench (Appellant Posthearing Brief, 358). It was required to stockpile open cut excavation and was thus unable to carry out its planned program of transporting the excavated material directly to be placed in dam embankment. As a result it had to perform unplan-

²³⁷ Unstable material fell and was removed on May 6, 1965, May 10, 1965, May 25, 1965, June 3, 1965, and June 9, 1965 (Appellant Exhibit C-104).

²³⁸ Appellant Exhibit C-104 (March 10, 1964 and July 21, 1964). Additional scaling after previous Bureau approval was allegedly required on April 16, 1965.

²³⁹ Appellant Exhibit C-104 (July 31, 1964, August 31, 1964, September 4, 1964, September 11, 1964, and October 17, 1964).

²⁴⁰ In both the outlet works stilling basin and the spillway stilling basin, appellant was required to place timbers against both the rock and concrete forms in an effort to minimize the amount of rock which repeatedly slid down into the areas and damaged the forms (34 Tr. 3839-40).

²⁴¹ 36 Tr. 4030; Appellant Posthearing Brief, 356.

ned multiple handling of the material.²⁴²

Change Order No. 3

During the open cut excavation a bedding plane was encountered which extended beyond neat lines, from the outlet portal end of the outlet works tunnel across the spillway excavation. This bedding plane, also referred to as a fault or shear zone,²⁴³ angled across the spillway excavation at approximately Station 6+95, then proceeded across the top of the nose of rock between the spillway and the outlet tunnel portal at approximately Station 14+36, and then crossed the outlet tunnel area roughly at right angles.²⁴⁴ It constituted an exception to the general attitude of the bedding.

By Order for Changes No. 3 (Exhibit No. 4), the appellant was directed to remove the material outside the neat lines and overlying the downstream side of the plane. The material overlying the downstream side of the plane from Station 5+20 to Station 8+50 consisted of broken and shattered rock. The condition was such that an unstable structural condition would have existed if the materials outside the neat lines had been allowed to remain. The contracting officer determined that the unstable loose rock would have en-

dangered the structures below (Exhibit No. 221, par. 60). He directed that payment for the material excavated be made at the bid price for Item No. 3 in the amount of \$1.72 per cubic yard. Cross sections were taken of the shear zone area outside of the neat lines of the structures. It was found that the additional excavation amounted to 2,379 cubic yards, for which appellant was awarded the sum of \$4,091.88.

Thereafter the contracting officer considered whether the condition constituted a changed condition under Clause 4 of the General Provisions (Exhibit No. 251, par. 45). While acknowledging that the change of bedding attitude provided "a slightly different condition," he noted that no explorations were conducted in the area either at the spillway or diversion outlet. He held, therefore, that the specifications did not portray any conditions relative to the area and consequently could not be misleading.

He also found that the attitude of bedding as shown on a limited number of outcrops in Drawing 526-D-2752 (Exhibit X-4) is correct and conformed identically with conditions encountered during construction. He noted that no extrapolation between outcrops was either indicated or implied.

Change Order No. 4

Due to a hazardous condition from loose and unstable rock in a layer of overburden on the right side of the spillway excavation between Stations 5+36 and 7+13,

²⁴² Appellant Exhibits C-104 (July 2, 1964) and C-243 (May 11 and June 24, 1964).

²⁴³ It created a thin brecciated zone and sharp drag folding (Exhibit No. 251, par. 44).

²⁴⁴ See Government Exhibits B-357, B-425, B-426 and B-444 and Appellant Exhibits C-115, C-117 and C-158 (photograph 4).

during the spring of 1965, the Government directed the contractor to cover the slope with wire mesh fencing to an approximate width of 35 feet (Exhibit No. 160).²⁴⁵ The slope is shown on Government Exhibit B-378. The Government furnished the fencing, rock bolts, anchors and supports.

Over the appellant's protest (Exhibit No. 160A), the Government issued Order for Changes No. 4 (Exhibit No. 5) to cover this work. It provided for payment in the lump sum of \$1,843.17, and \$7.56 for furnishing and handling cement (at the unit price of \$5.04) under Bid Item 34. It also allowed appellant and extension of eight days in the time required for performance.

The appellants' position is that this change order:

* * * does not recognize and provide compensation and time extension for damage to forms, replacement and realignment of forms and spillway cleanup related to this work and the changes, changed conditions and Bureau staking errors which made this extra work necessary (Exhibit No. 203).

The appellant charges specifically that the contracting officer:

* * * Totally ignored the contractor's material and cost figures, arbitrarily selected his own cost figures and made no payment for foreman's time or the difficult and perilous nature of the work and did not even include markup for overhead

²⁴⁵ Mr. Moore testified that at Station 6+20 the slope was 1½:1 and 1:1 at Station 6+59. The actual slope excavated was generally 1:1, but at Stations 6+59 and 6+20 the actual slope was considerably steeper than 1:1 (74 Tr. 8185). A note on Government Exhibit B-378 indicates the wire mesh as extending from Station 5+50 to Station 7+50.

and profit. (Appellant Posthearing Brief, 437).

In addition, as mentioned *supra*, the appellant maintains that the issuance of Change Order No. 4 and payment therefor were "deliberately delayed" until September 1965 "because the Bureau did not have funds to pay for the change," although the work was performed in April and May 1965.²⁴⁶ Appellant bases this assertion, in part, on a Government teletype message (Appellant Exhibit C-209), dated June 16, 1965, which included:

We will advise shortly if other funds can be transferred. Withhold change order and reapportionment until advised.

Quantities

The appellant has alleged that the quantity of open cut excavation computed by the Government was deficient.²⁴⁷ By means of plottings

²⁴⁶ Appellant Posthearing Brief, 436. Although dated April 30, 1965, Change Order No. 4 was not received until September 7, 1965 (Exhibit No. 203). The Government asserts that the reference to change order in Exhibit C-209 did not apply specifically to Change Order No. 4 but to all change orders and, furthermore, that C-209 was effective only until the end of Fiscal Year 1965 some 14 days later (Government Posthearing Brief, 528). The Government maintains that the lapse in time between completion of the work directed and the issuance of Change Order No. 4 "was due solely to the time consumed in processing the order through the various Bureau offices." (Government Posthearing Brief, 527.) The question of the Government's delay in the issuance of Change Order No. 4 is taken up *infra* in note 405.

²⁴⁷ Although there are some 28 pages of contractor-prepared plats, as well as numerous Government cross-sections and survey notes, and many pages of testimony in the record on the subject of the Government's survey pertaining to open cut, appellant's failure to refer to this material in its Posthearing Brief leads to the conclusion that its position in

by Mr. Curd²⁴⁸ depicted on Exhibit X-48, the appellant sought to demonstrate a plethora of serious Bureau survey errors and discrepancies. These are said to have rendered the Government survey inadequate for the purpose of measuring pay quantities (44 Tr. 5019-20). In addition, the staking supplied the contractor was allegedly inadequate for control of excavation and "required [it] to excavate by approximation, and later to perform expensive and time-consuming additional excavation scaling and remedial work" (Appellant Exhibit X-48A, p. 7).

Exhibit X-48 is a series of 28 plats prepared by Mr. Curd relating to open cut excavation for the upstream tunnel face, the downstream tunnel face, the spillway, the shaft house, and the roadway approach to the spillway bridge. Data used in preparing the plats were allegedly derived from the contract and from reproductions of Government survey documents (Appellant Exhibit Exhibit X-48A).

In Exhibit X-48A (an explanation or summary of Exhibit X-48) the appellant alludes to staking data which contain 22 instances in which the stakes were set either above or

below original ground. On Plats 2 and 3, Sections B and H purportedly show cut stakes below original ground and Sections A, D and E, cut stakes above original ground. Alleged discrepancies between staking data and surveys of original ground are plotted and pointed out.²⁴⁹ In addition, appellant refers to areas (Plats 10 and 11, spillway) in which no staking information is shown in the data supplied and to areas for which the Government interpolated original ground from a topographic map. The lack of original ground in the upper part of the spillway, shaft house, and approach to the spillway bridge made accurate quantity computations impossible according to Mr. Curd (Appellant Exhibit X-48A, p. 7).

At the hearing the Government sought to introduce into evidence an analysis of Exhibits X-48 and X-48A contained in a document identified as Government Exhibit B-553.²⁵⁰ The hearing official deferred a ruling on the admissibility into evidence of Exhibit B-553 until the matter could be considered by the members of the Board participating in this decision (77 Tr. 8611-12). The Board has done so.

The Board has substantial latitude in the area of admission or ex-

this regard has been abandoned, as the Government has contended, particularly since the appellant remained silent in its Posthearing Reply Brief in the face of such charge.

²⁴⁸ Mr. Curd had been in charge of a survey party for the Government at Lost Creek (15 Tr. 1636). His employment by the Government was subsequently terminated on August 15, 1964, as a result of a reduction in force (69 Tr. 7558). He thereafter went to work with the Midtown Corporation of St. Paul, Minnesota, about September 1, 1964 (15 Tr. 1637). On July 1, 1967, he was employed by the appellant (15 Tr. 1637).

²⁴⁹ See Appellant Exhibit X-48A, pp. 3-5. According to appellant, at centerline point 15+55 there is a variation of four feet in elevation between radial and cross-sections.

²⁵⁰ Government Exhibit B-553 also contains analyses of Appellant Exhibits X-45 and X-45A relating to dam embankment and Appellant Exhibits X-47 and X-47A relating to borrow.

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clusion of evidence.²⁵¹ In a case of this magnitude and complexity, where the Board must deal with a voluminous record, the Board will exercise that discretion and admit into evidence such items as appear designed to enhance its understanding of the issues and assist it materially in the performance of its functions.²⁵² Government Exhibit B-553 pertaining to open cut excavation is hereby admitted into evidence.

The contractor contends that it encountered excessive open cut excavation. The contracting officer found that the open cut excavation for the spillway, tunnel inlet, tunnel outlet and stilling basin was staked in accordance with the specifications,²⁵³ except for the overburden

on the right side of the spillway, which was staked on a 1:1 slope instead of a 1½:1 slope as specified in the contract (Exhibit No. 251, par. 53).

the schedule regardless of such variations except as may be covered under Paragraph 18.

"All necessary precautions shall be taken to preserve the material below and beyond the established lines of all excavation in the soundest possible condition. Any damage to the work due to the contractor's operations, including shattering of the material beyond the required excavation lines, shall be repaired at the expense of and by the contractor. Any and all excess excavation for the convenience of the contractor or overexcavation performed by the contractor for any purpose or reason, except as may be ordered in writing by the contracting officer, and whether or not due to the fault of the contractor shall be at the expense of the contractor. Where required to complete the work, all such excess excavation and overexcavation shall be refilled with materials furnished and placed at the expense of and by the contractor: *Provided*, That payment will be made for cement used in concrete placed to refill such excess excavation or overexcavation unless such excess excavation or overexcavation is caused by careless excavation or is intentionally performed for the convenience of the contractor to facilitate his operations, as determined by the contracting officer. Slopes shattered or loosened by blasting shall be taken down at the expense of and by the contractor.

"All excavation for embankment and structure foundations shall be performed in the dry. No excavation shall be made in frozen materials without written approval. No additional allowance above the unit prices per cubic yard bid in the schedule for excavation will be made on account of any of the materials being wet or frozen.

"Where not to be covered with concrete or pervious blanket, excavations in open cut shall be made to the full dimensions required and shall be finished to the prescribed lines and grades except that individual sharp points of undisturbed ledge rock will be permitted to extend within the prescribed lines not more than 6 inches.

"b. Structure foundations.—The bottom and side slopes of excavation upon or against which concrete is to be placed shall be excavated to the required dimensions as shown on the drawings or established by the contracting officer. No material will be permitted to extend within the neatlines of the structure. If, at any point in excavation, upon written orders from the

²⁵¹ See *Allison & Haney, Inc.*, IBCA-587-9-66 (July 24, 1969), 76 I.D. 141, 149, 69-2 BCA par. 7807, at 38,262.

²⁵² Cf. Model Code of Evidence, rule 105(j) and comment thereto.

²⁵³ Paragraph 51 of the specifications governs computations and payment of open cut. In pertinent part it provides as follows:

"a. General.—All open-cut excavation required for the dam and appurtenant works shall be performed in accordance with the provisions of this paragraph and Paragraphs 52 and 54, inclusive. Open-cut excavation in borrow areas shall be in accordance with Paragraph 59. Excavation shall be made to the lines, grades, and dimensions shown on the drawings or established by the contracting officer. During the progress of the work, it may be found necessary or desirable to vary the slopes, grades or the dimensions of the excavations from those specified herein. Any increase or decrease of quantities excavated as a result of such variations will be included in the estimates which shall be subject to the provisions of Paragraph 18. However, if the contracting officer determines that the contractor's costs of performing the work will be increased by reason of such variations an equitable adjustment will be made to cover such increased costs. Otherwise, the work will be paid for at the unit price bid therefor in

It appears that in some instances the appellant excavated outside these staked lines and in other cases its final excavation was inside the staked lines. Cross sections of the tunnel inlet portal, tunnel outlet portal, stilling basin and spillway were taken so that the actual volume excavated in those areas could be computed.

Mr. Moore, who was responsible for computing the quantities for payment, testified that he did so on the basis of the material actually removed within the neatlines or paylines. If the appellant did not remove it, although it was within the neatlines, no payment was allowed. No payment was allowed either if material outside the neatlines was removed.

With respect to tunnel inlet portal open cut, the actual quantity contractor removed was 7,462 cubic yards.²⁵⁴ The quantity within the payline or neatline was 8,274 cubic yards. The quantity not removed within the payline was 3,080 cubic yards. Of the total quantity appel-

lant actually removed, 5,194 cubic yards were removed from within the neatline and 2,268 cubic yards were actually removed from outside the payline.

Mr. Wilcox expressed the opinion that the ground was staked as called for by the specifications (79 Tr. 8890-91). The Government, however, contends that the contractor did not excavate in accordance with the contract (Government Post-hearing Brief, 240). At the steep area straight above and to the immediate left and right of the tunnel opening, the excavation is considerably inside the staked paylines.²⁵⁵ The excavation is more in accord with the paylines as it proceeded outward.

At the top of the slope, the specifications indicate a large area of material classified as overburden having a 1½:1 excavation slope. Although it was staked for removal, the Government sections and model show that the appellant did not actually remove a great deal of this material.²⁵⁶

As for the outlet portal open cut, the quantity within the neatline was 7,188 cubic yards. The actual quantity removed was 6,227 cubic yards. Of that amount, 5,409 cubic yards were actually excavated within the payline and 818 cubic yards were removed from outside the neatline. A total of 1,779 cubic yards was not removed from within the payline.

With respect to the outlet works stilling basin, the quantity esti-

contracting officer, material is excavated beyond the limits required to receive the structure, the additional excavation shall be filled solidly with concrete. Payment for such additional excavation will be made at the unit price per cubic yard bid in the schedule for excavation for the structure involved. Payment for concrete placed in such additional excavation will be made at the applicable unit price per cubic yard bid in the schedule for concrete in the structure involved. Excess excavation performed for the convenience of the contractor and overexcavation performed by the contractor for any purpose or reason without written orders of the contracting officer, shall be refilled with concrete furnished and placed at the expense of and by the contractor subject to the provisions of Subparagraph a. for payment for cement."

²⁵⁴ See Appellant Exhibit C-128 and Exhibit No. 251, par. 54.

²⁵⁵ See Exhibits X-56 and X-57.

²⁵⁶ See Exhibits X-56, X-57, C-80 and B-569.

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mated inside the payline was 16,802 cubic yards. The actual quantity removed, however, was 18,818 cubic yards. Of that amount, 16,662 cubic yards were actually removed from within the paylines. Thus, 140 cubic yards less than the estimated amount were removed from within the neatline. The amount removed from outside the payline was 2,013 cubic yards.

It appears that in the stilling basin, of the 2,016 yards of overexcavation, 101.49 cubic yards had to be refilled with concrete.²⁵⁷ The Government, however, reduced the amount of concrete refill by allowing the contractor to substitute gravel in the area between the two drains in the floor of the stilling basin.²⁵⁸

Finally, with respect to the spillway, the quantity within the payline expected to be excavated was 99,969 cubic yards. The actual quantity excavated was 104,275 cubic yards. Of that amount, 95,278 cubic yards were actually removed from within the neatline, 4,691 cubic yards were not removed from within the paylines and 4,306 cubic yards were removed from outside the paylines.

The overbreak quantity from Government Exhibits B-536 and B-537 indicates that of the 4,306 cubic yards of excavation outside the neatline, 735 cubic yards were in the floor, which had to be refilled

with concrete. The refill for such overexcavation averaged 0.57 foot between Stations 2+30 and 2+85, 1.18 feet between Stations 2+85 and 7+37, 0.90 foot between Stations 7+37 and 7+76, and 0.86 foot between Stations 7+76 and 9+10.

As we have seen, the spillway survey data show several instances of cut stakes higher than or lower than original ground. According to the Government, nearly all of them represented instances where the contractor disturbed conditions before survey was taken.²⁵⁹

The contractor has also alleged that on August 13, 1963, it was directed to excavate in two triangular-shaped areas at the upstream inlet portal face shown on its Exhibits C-113 and C-114. The material there was said to be so porous that during the drilling for the blasting operation "blow air" could be seen being emitted from the rock face (Appellant Prehearing Brief, 44).

It is undisputed that this material is outside the staked lines. Mr. Miller testified that Mr. Wilcox directed the contractor to remove it (22 Tr. 2441). Mr. Wilcox has admitted that he was aware that the contractor planned to remove this material and did not object, but he denied that he directed appellant to do so (12 Tr. 1316-17; 79 Tr. 8896). His position was that the material was "no different" than that shown in the specifications (12 Tr. 1314-15).

²⁵⁷ Government Exhibits B-536 and B-537-A (p. 4).

²⁵⁸ See 36 Tr. 4042; 61 Tr. 6811; 80 Tr. 8958; Government Exhibits B-436, B-448 and B-598; Appellant Exhibit C-158.

²⁵⁹ Government Posthearing Brief, 246-47, citing Mr. Miller's testimony at 19 Tr. 2096 in connection with a contractor haul road.

Mr. Wilcox's diary (Appellant Exhibits C-245, C-246 and C-247) does not indicate any such order to the appellant on August 13, 1963. Both the Daily Construction Reports and Mr. Wilcox's diary contain reports of a conversation on or about September 24, 1963, in which Mr. Wilcox is shown as having told Mr. Miller that the Government had not ordered this excavation and would not authorize payment for it.²⁶⁰

Another dispute arose when it was discovered that a portion of the tunnel and portal excavation was too small to accommodate the transition to the intake structure. Mr. Wilcox described the problem in his Daily Construction Report for June 9, 1964, as "insufficient rock excavation at the inlet portal where they are placing rebars for the last tunnel placement and are also getting ready for the intake structure" (Government Exhibit B-303, p. 243).

Section F-F on Drawing 526-D-2706²⁶¹ indicates that from Station 4+25 to Station 4+34, excavation in the rock is to have a 1:1 slope from a subgrade width of eleven feet, including a clear distance of one foot from the base of the structure to the toe of the slope. From Station 4+34 to Station 4+36, excavation is to be the same except that an elevation change in the sub-

grade increased the width to twelve feet. At Station 4+34, the left side was about nine inches tight, the right side was about two feet tight and the slopes on both sides were steeper than 1:1.

In view of the tightness the contractor was told "to take it out" (79 Tr. 8933). The contractor thereupon, according to the Government, "moved in a spread of heavy excavating equipment and excavated out the entire area."²⁶² The end result was substantial overexcavation (Exhibit X-56).

Decision

Cleanup

The requirements imposed by the Government respecting cleanup of the rock, preparatory to placing concrete in the floor of the spillway and the floor of the outlet works stilling basin, are said to have been unreasonable (Appellant Posthearing Brief, 356). The provision of the specifications applicable is Paragraph 93b, which call for "all surfaces * * * against which * * * concrete is to be placed" to "be free from standing water, mud and debris" and "from oil, objectionable coatings, and loose semidetached, or unsound fragments."

The appellant has not shown that the Government imposed requirements which exceeded the provisions of 93b. On the contrary, there appear to have been instances as Mr.

²⁶⁰ Government Exhibit B-302, p. 29; Appellant Exhibit C-245, p. 88.

²⁶¹ Examination of Sections B-B, C-C, and F-F on Drawing 526-D-2706 shows the water opening going, from downstream to upstream, from a circular shape to a square in nine feet from Station 4+34 to Station 4+25.

²⁶² Government Posthearing Brief, 252, citing Government Exhibits B-565, B-566 and B-567.

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Doak testified, where the Government actually relaxed those provisions to the advantage of the appellant (36 Tr. 4030). The record does not support a finding that the Government was unreasonable or that the cleanup requirements were impossible to observe.²⁶³ The claim is denied.

Scaling Slopes

Appellant's contentions respecting the necessity for scaling rock slopes are without merit. Incorporated into the contract by reference, pursuant to Paragraph 10 of the General Conditions, are the provisions of a Bureau of Reclamation publication, entitled "Safety Requirements for Construction by Contract" (Government Exhibit B-338). Paragraph 14-10 of Exhibit B-338, which relates to open excavation, provides that the sides "be sloped to a stable angle of repose, or supported by sheet piling or adequate shoring" where danger of slides exists and workmen may be endangered. Under Paragraph 51a. of the specifications, "[s]lopes shattered or loosened by blasting" are to "be taken down at the expense of and by the contractor."

Thus, the appellant was responsible under the contract for scaling or taking down all materials on rock

slopes which were found to be loose during construction. The amount of scaling required fell within the purview of the contract.

Ridge of Rock

The appellant has contended that it was unable to hold to neatlines the ridge or "nose" of rock material between the outlet works and spillway.²⁶⁴ However, as can be seen on Government Exhibit B-357, appellant on occasion would bring the material down from the spillway excavation and push it over the side into the area of the outlet works stilling basin. It therefore appears that the contractor was primarily responsible for its inability to hold the ridge of rock to the neatlines. We find no merit to this claim.

Change Order No. 4

The Government has conceded that the area above the spillway which required the wire mesh called for by Change Order No. 4 was incorrectly staked to a slope of 1:1 instead of 1½:1 (Government Post-hearing Brief, 298). Its position is that the contractor is entitled to no further compensation for this error in staking than it allowed in Change Order No. 4. The payment provided for was based solely on Government records.

If the adjustment contained in the changed order was inadequate, it was incumbent upon the appel-

²⁶³ Similarly, we are unable to find that the Government acted unreasonably in requiring appellant to remove materials (which are shown on Government Exhibits B-364, B-579, and B-580) which fell down off of the right side of the spillway slope during the winter of 1964-65. If appellant anticipated that no material would slough off the slope during the winter, it was an unreasonable expectation.

²⁶⁴ The ridge or nose of rock is shown in Government Exhibits B-357, B-364, B-443 and B-576.

lant to furnish the appropriate proof. According to Mr. Doak, a record of the expense of performing the work was kept, but he did not know whether the Government was ever billed therefor (36 Tr. 4104-05). Mr. Moore testified, however, that he did not receive any billing from the contractor for the changes required under Change Order 4 (74 Tr. 8186). In the absence of any additional data upon which the Board can base a further allowance, the contracting officer's unilateral determination is upheld.

Quantities

The appellant maintains that the Government was "unable to compute Open Cut excavation quantities accurately" because it has "no accurate ground survey from which to start its computations." It criticizes the contracting officer for refusing "to pay for any of the excavation in open cut beyond theoretical neat line" (Appellant Prehearing Brief, 46).

The record does not support a finding that Government surveying was inadequate for determining the quantity of open-cut excavation. The instances relied on by the appellant fail upon analysis. Thus, appellant contends by means of its Exhibits X-48 and X-48A that the original ground survey for the spillway and that for the outlet works stilling basin do not go together when plotted on the same paper, by reason of elevation dis-

crepancies.²⁶⁵ The Government, however, demonstrated that the plottings on Exhibit X-48 were not made properly.²⁶⁶ Mr. Curd, also, was unable to furnish pertinent details, such as the scale he used, regarding the plottings (68 Tr. 7449).

Similarly, with respect to the radials from Station 15+55 on the outlet works, the alleged discrepancy between the normal sections and the radials is due to incorrect or reverse plotting of the normal sections by Mr. Curd as between Plats 4 and 5 of Exhibit X-48.²⁶⁷ In connection with the inlet tunnel portal, also, the original Government ground survey was made by Mr. Curd. He did not set the cut stakes at the same time that the original ground was taken; the original ground survey was erroneous. Mr.

²⁶⁵ See Appellant Exhibit X-48, Plats 19-26 and Appellant Exhibit X-48A, pp. 5-6 (discussion of Plats 19-26). Mr. Curd states on p. 6 of X-48A, in connection with Plats 20-26: "By referring back to plat numbered 19, it can be seen that spillway section 7+76 crosses outlets works section 15+24.5 at what should have been a common elevation point. *It will be observed that the elevation is not common by more than 10 feet.*"

²⁶⁶ 74 Tr. 8187-88. Mr. Moore testified (74 Tr. 8188): "The centerline is off ten feet on Mr. Curd's plotting." Examination of Plat 19 of Exhibit X-48, which purports to show the intersection of the outlet works centerline and the spillway centerline, based upon an assumed scale of 25 feet to the inch, reveals the correct distance from this intersection to outlet works Station 14+32.5 as 279.36 feet. Mr. Curd apparently plotted this distance as 266 feet. The correct distance from this intersection to spillway Station 5+03 is 79.89 feet. Mr. Curd apparently plotted this distance as 81.5 feet (Government Exhibit B-553, respecting Appellant Exhibit X-48, p. 17).

²⁶⁷ 67 Tr. 7873-74. On p. 11 of Bureau Surveying Book 01.048-14 (Government Exhibit B-571), it can be seen that the right-left normal sections were at first incorrectly designated by Mr. Curd.

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Curd did not extend the sections far enough to pick up the "catch point" or cut stake locations and some ground breaks.²⁶⁸ It was therefore necessary on the following day for Mr. Wilcox to set the cut stakes at the proper location and extend the original ground to the "catch" or cut stake location.²⁶⁹

Since the survey was corrected one day later, the contractor was not harmed by the errors made by Mr. Curd in the initial survey for the Government. In addition, it appears that the quantities were calculated on the basis of the original ground line from the initial survey. The appellant, therefore, received payment for excavating material in the area of the depression. As no material had to be removed therefrom, it would seem that this actually constituted overpayment.

Insofar as the inlet portal open cut is concerned, it is clear that the Government did not get the excavation designed or staked. It does not appear to us that lack of original ground staking made accurate quantity computations impossible. Rather, the cut stakes set for the inlet portal constituted a point on the original ground and can be said to have extended or supplemented the original ground surveys. Using cut stake data there was sufficient original ground survey to compute

excavation quantities for the outlet works inlet portal.

Moreover, the placing of a cut stake prior to any excavation has the same effect as setting another point on the original ground survey. In those instances where a discrepancy regarding cut stakes and original ground does appear to exist, the Government included the point for measurement that would provide the greater volume of excavation for payment.

The computation of quantities of excavation of the spillway and outlet works stilling basin for the purpose of payment was quite involved. Excavation was required from two different slopes in the same plane as shown on Drawings 526-D-2702, 526-D-2705, and 526-D-2709. These two slopes are a 1:1 slope for normal sections (perpendicular to the centerlines) and a 2:1 slope from radial lines originating from the outside edges of the end of the concrete basins. The volume of excavation as measured for payment was computed by average end areas of sections normal to centerline. In order to compute end areas normal to centerline the excavation along the radial lines had to be projected into the plane normal to centerline. This was accomplished by computing the angle of intersection of the radial lines to the normal lines and then dividing the 2:1 slope by the cosine of this angle.

We find that construction and payment measurement were made in accordance with the provisions of Paragraph 51. Excavation was

²⁶⁸ A knob of rock that the cut stake sat on was not taken into consideration on Section A on the left side (79 Tr. 8898). On Section H, on the right side, Mr. Curd did not note a gully in which a cut stake fell making it appear that the stake is underground (79 Tr. 8899).

²⁶⁹ 79 Tr. 8879; 67 Tr. 7363; Government Exhibit B-563; Exhibit X-56.

staked to lines and grades depicted on the drawings. Where concrete refill was involved, excavation was required to full structure dimensions. Payment was determined under the specification paylines for material actually removed at the contracting officer's direction. In the case of the shear zone across the outlet works and spillway at about Station 6+95, additional excavation (or resloping or redimensioning) was considered to have been ordered and paid for pursuant to Paragraph 51b., covering structure foundations.²⁷⁰

As for the triangular areas outside the staked lines (shown on Appellant Exhibits C-113 and C-114), which the Government allegedly directed appellant to excavate, Mr. Wilcox's diary and daily construction reports are determinative. They are contemporaneous records of the events of August and September 1963, relating to removal of the porous material. It does not appear from these records that Mr. Wilcox did in fact order such excavation. Merely because he did not object to appellant's plan to remove the material does not in and of itself make the Government liable for the cost of removal where the specification provided that excavation outside the staked lines was non-compensable. Paragraph 51a. clearly provides that:

* * * excess excavation for the convenience of the contractor or overexcavation performed by the contractor for any purpose or reason, except as * * * ordered in writing by the contracting officer

* * * shall be at the expense of the contractor.

Having excavated beyond the staked lines the conduct of the appellant was of a voluntary nature.

For the same reason, we are unable to hold the Government responsible for appellant's overexcavation in connection with transition to the intake structure on June 9, 1964. The appellant elected to utilize heavy excavation equipment where lighter equipment was preferable and adequate. The Government under such circumstances is not liable for the resulting overexcavation.

We regard as unreasonable appellant's position that only the schedule quantity would be taken out. The Government did not represent in the contract that overbreak would not occur, that the rock could be neatly sliced off, just as we held *supra* that the "B" line is three inches outside of the "A" line is not a representation that the rock excavation could be accomplished within that tolerance.

Under Paragraph 51a. overexcavation performed beyond paylines is the contractor's responsibility unless so ordered by the Government in writing. Only in the case where rock or similar material that cannot be trimmed to accurate dimensions is to have concrete placed against it does the contract provide, in Paragraph 51d., that the Government will pay to the neatlines of the structure plus three inches. Put another way, where concrete refill is involved, the Government is obligated under the contract to pay for

²⁷⁰ Payment therefor was allowed under Change Order No. 3.

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three inches of overexcavation beyond staked lines, whether overexcavation actually occurred or not. All other overbreak is the contractor's responsibility.

The record, moreover, does not support a finding that the appellant took any particular care where it was required to excavate in rock. According to Mr. Russell Borden, Bureau construction liaison engineer, there are a number of techniques that may be utilized to avoid overbreak in rock excavation (79 Tr. 8826-29). No indications that these methods were employed at Lost Creek are present (79 Tr. 8832-33).

The appellant also maintains that the lack of any quantity of overbreak in the Government's estimates of quantity of concrete and excavation in Appellant Exhibit C-126 is deceptive. The Government concedes, at 258 of its Posthearing Brief, that these figures do not contain an allowance for overbreak. The reason given is that the Government estimates are intended to predict the amount of work within the paylines, not outside of them. Consequently, no allowance for overbreak is made, since the amount of overbreak is a matter to a large extent under the sole control of the contractor. Were the amount of pay governed only by the amount of excavation, the contractor would be in the enviable position of regulating its own compensation.

A prudent contractor, on the other hand, in the Board's view, should include a contingency for

overbreak in its bid.²⁷¹ Mr. Charles Palmetier, assistant chief construction engineer for the Bureau, testified at the hearing that in open cut or tunnels allowance should be made for from nine to twelve inches of overbreak in structures founded on rock outside the payline.²⁷²

As the Board said in *Vitro Corporation of America*,²⁷³ paylines are established to eliminate the possibility that a project owner, such as the Government, may be required to pay a fixed unit price for excavation that is not essential for completion of the project. The lines here are plainly paylines, rather than definite indications of expected excavation conditions, and do not constitute representations.²⁷⁴

Changed Conditions

The appellant asserts that it was justified in anticipating sound rock and stable or monolithic limestone

²⁷¹ In *Cheney-Cherf and Associates, IBCA* No. 250 (June 19, 1962), 1962 BCA par. 3395, the Board said at 17,451:

"Appellant's testimony was that it had anticipated an overbreak, or enlargement of the tunnels beyond the pay lines, of about 17% in volume. The actual percentage of overbreak was about 30% * * *. However, a 30% overbreak is not unusual. * * *. [T]he appellant's expectation of a 17% overbreak appears to have been rather sanguine." See *S. S. Mullen, Inc.*, IBCA-517-9-65 (May 15, 1967), 74 I.D. 152, 67-1 BCA par. 6337.

²⁷² Mr. Palmetier's testimony was excluded, upon objection of the appellant. The Government thereafter made an offer of proof for the purpose of securing a ruling on the admissibility of the testimony by the Board (83 Tr. 9463). The Board holds that his testimony should have been received.

²⁷³ IBCA-376 (August 24, 1967), 74 I.D. 253, 279, 67-2 BCA par. 6536.

²⁷⁴ Compare *Morgen & Oswood Construction Co., Inc.*, IBCA-389 (April 21, 1966), 73 I.D. 131, 66-1 BCA par. 5522.

that could be removed to specified lines without significant problems from solution caverns, shear zones and clay scars and faults and without incessant additional excavation or cleanup. Particular emphasis for this position is placed on its Exhibit C-27, a 1962 Government drawing (526-400-255) of profiles of geologic sections A-A' and B-B'. The appellant maintains that these sections portray nearly pure limestone extending virtually throughout the entire outlet works excavation, whereas the calcareous shale beds which the Government points to are actually located outside the area of excavation (Posthearing Reply Brief, 50).

In our view, appellant's reliance on Exhibit C-27 is unwarranted. In the first place, the record does not support a finding that appellant consulted C-27 at the pre-bidding stage. In the second place, it appears that the appellant confused a mere generic symbol for the rock limestone for a description of its condition. Finally, while section A-A' indicates the dip of the formation at 45° into the right abutment, section B-B' illustrates a section at almost exact right angles to the dip. Thus, it shows no dip.²⁷⁵

The appellant, moreover, is charged with the knowledge that a reasonable site investigation would impart to a reasonably prudent contractor knowledgeable in the basic

nature of the work to be performed. Since it is here dealing with limestone, the appellant is charged with knowledge of the general nature of "limestone."²⁷⁶ Under Paragraph 50c. of the specifications "limestone" is defined as a "sedimentary rock consisting essentially of the mineral calcite (calcium carbonate); thin bedded to massive, moderately hard to brittle, jointed, agrillaceous in places, contains several shaly units."²⁷⁷

Examination of the surface geology indicates that the limestone was laid down in essentially a horizontal attitude in layers or beds. The rock was upthrust from the flat to an angle of 45 degrees (57 Tr. 6252). These forces affected the beds, resulting in joints, gouge, slip-

²⁷⁶ Under the circumstances of this case, the appellant must be charged with the requirement of checking the geologic facts with a geologist. *Vitro Corporation of America*, note 273, *supra*. Cf. *Humphrey Contracting Corporation*, note 76, *supra*, 75 I.D., at 32, 68-1 BCA at 31,518 in which the Board said (omitting footnotes):

"At the time of performance under this contract appellant had only had one previous mountain job; its work had been primarily in the plains area of the country. It was incumbent upon appellant to familiarize itself with local conditions and to make inquiry regarding local problems. There is no proof in the record that this was done."

²⁷⁷ The dictionary definition of "limestone" is:

"* * * a rock that is chiefly formed by accumulation of organic remains (as shells or corals), that consists mainly of calcium carbonate though sometimes also containing magnesium carbonate * * *" (Webster, *New International Dictionary* (3d ed. 1966), 1312.) "Sedimentary rock" is defined as:

"* * * rock formed of mechanical, chemical, or organic sediment: as a: clastic rock (as conglomerate, sandstone, or shale) formed of fragments of other rock transported from its source and deposited in water. b: rock (as rock salt or gypsum) formed by precipitation from solution. c: rock (as limestone) formed from secretions of organisms" (*Id.*, 2054).

²⁷⁵ The effect is similar to that of looking at a book lying on its side and the pages as they are exposed on the side opposite the binding. Raising the book to 45° does not change the perspective; only the page ends are still seen.

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page planes, and shear zones (57 Tr. 6253-54).

Running along the entire right abutment is a ridge of limestone, symbolized on Drawing No. 526-D-2752 (entitled "Location of Exploration and Surface Geology") as "JTc." The drawing indicates the presence of bedding and jointing.²⁷⁸ The prominence of bedding and jointing is also apparent from observation of Government Exhibits B-360 and B-422 and Appellant Exhibit C-114 (59 Tr. 6484).

In the subsurface data the conditions which appellant has complained of as unexpected are in fact mentioned. The bedding dip is shown as staying at approximately 45° at the inlet portal, near the dam axis and down spillway.²⁷⁹ The limestone is described as "broken and stained" or as "broken" in the drill hole logs applicable to the inlet

portal, dam axis and spillway.²⁸⁰ There are numerous references to the presence of pieces of core from one inch to three inches or less.²⁸¹ There are several references to the existence of pieces of core from one inch to five inches, and from one inch to ten inches.²⁸² The existence of clay or clay joints, a vertical joint, and shale is mentioned.²⁸³ Gouge is also shown (Drill Hole DH 8).

We next will examine the individual structures, the inlet portal, spillway, and outlet works stilling basin. The inlet portal is shown on Appellant Exhibit C-18. Visible thereon are the joints. The data contained on Drawing 526-D-2752 indicates closely spaced bedding averaging two feet and joints averaging four inches. Where closely spaced bedding is encountered, combined with joints, rock that is largely broken up is produced. As indicated by Drill Hole 28, which is largely below the grade of the excavation here, the rock is noted as being broken and stained. Drill Hole 20, which was in the center of the excavation, indicates rock that is broken, stained and bedded at 45°. Drill Hole 19, which is outside the excavation here to the right, describes

²⁷⁸ The bedding at the inlet portal area is shown as spaced from six inches to five feet, with an average of two feet and as dipping 43° into the abutment. Near the dam axis, the bedding is spaced from six inches to three feet, with an average of one foot, and dips 44° into the abutment. At the mid-spillway and outlet works portal, the bedding is spaced from two inches to one foot, with an average of six inches, except for about 10° spaced ¼ inch in units one foot thick, dipping 45° into the abutment. The jointing is depicted as follows. At the portal it is spaced one inch to ten inches, with an average of four inches, dipping downstream toward the left abutment at 46°. Upstream from the axis is an area of "contorted and irregular jointing," spaced ½ inch minimum, with an average of two inches, dipping at 65° and 40°. At the dam axis, the jointing is spaced from a minimum of ¼ inch to a maximum of one foot, with an average of two inches, dipping at 60° and 65°.

²⁷⁹ See Drill Holes DH 20, DH 17, and DH 9. The logs of exploration for these drill holes and those mentioned in notes 280-283 are found on Drawings 526-D-2753, -2754, and -2755.

²⁸⁰ Broken and stained: DH 19, DH 20, and DH 28 (inlet portal); DH 21 (twice) (near dam axis); DH 13, DH 27 (down spillway). Broken: DH 17 (twice), DH 1 (twice); DH 16; DH 12; and DH 9.

²⁸¹ See Drill Holes DH 20, DH 19 (inlet portal); DH 21, DH 17 (dam axis); DH 12 (down spillway).

²⁸² See Drill Holes DH 28, DH 20, DH 19 (inlet portal); DH 17, DH 16 (dam axis); DH 13 (down spillway).

²⁸³ See Drill Holes DH 21, DH 1, DH 16, DH 12, DH 9 and DH 27.

conditions similar to Drill Hole 20, except it indicates a sandstone-limestone layer somewhat below tunnel grade.²⁸⁴

With respect to the spillway, there are several small rock outcrops near the top of the hill at the end of the spillway, identified on Drawing 526-D-2752 by the symbol, "Jtc." That symbol represents limestone, medium to massively bedded. Going down the spillway are several other small outcrops with a massive outcrop between Drill Hole 11 and a point below Drill Hole 10, marked on the drawing with the symbol "Jtc.", or "limestone, thin bedded." This is defined as having average bedding of about two inches "with paper thin shale partings" between the thinner beds.²⁸⁵

The log for Drill Hole 16 which is in the inlet area near the top, several feet to the left of the centerline of the spillway, indicates limestone between 4 feet and 29 feet, broken along the bedding, averaging four inch pieces. A clay-filled joint is referred to near the top at 4 feet, 8 inches. Approximately 35 feet to the right is Drill Hole 17. Inter-mixed sandstone and limestone are shown with bedding at 5 to 10 inch intervals. Essentially the same is found between 26.5 feet and 35 feet. In both of these reaches, a 45° dip is noted for the bedding. Drill Hole

1, somewhat further to the right, denotes broken limestone and layers of red shale between 70 and 90 feet.

Going down the spillway centerline, Drill Hole 13 shows rock "hard, fresh, broken and stained" in 2-inch to 10-inch intervals. Drill Hole 12 shows thin-bedded limestone "interbedded with thin calcareous shale" layers, broken and weathered. Drill Holes 10 and 11 note the rock as fresh and brittle. Drill Hole 9 shows this bedding, brittle rock and a 45° dip.²⁸⁶

It appears that the rock exposed by the excavation was an accurate reflection of the subsurface data. Appellant Exhibits C-91 and C-92 are a map of the complete excavation. Both Drill Holes 16 and 1 have clay or shale filled areas. Exhibit C-91 shows that approximately 14 clay filled shear zones were encountered between Stations 2+40 and 4+40. In addition, there are numerous notations of broken limestone with gouge or clay on the joint surfaces. Drill Holes DH 1, DH 16 and DH 17 all showed broken limestone, weathered limestone and rock that broke easily during drilling.

In connection with the outlet works stilling basin, the subsurface data the appellant should have referred to would be located near the bottom of the slope from the spill-

²⁸⁴ 29 feet subtracted from 5864.6 is 5835.6. The invert grade of tunnel at Station 4+34 is 5842.

²⁸⁵ This area roughly covers the portion of the spillway between Stations 7+00 and 8+50 (Appellant Exhibit C-198).

²⁸⁶ Other holes in the creek bottom beyond the end of the spilling basin are DH 26 and DH 27 on the left side and auger hole, AP 67. Near the center of the channel are DH 8 and AP 66 and DH 4, DH 7 and AP 30 are on the right side. These holes show a similar pattern to the rock. In addition, DH 8 mentions gouge, and DH 4 indicates four feet of shale.

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way.²⁸⁷ They are Drill Holes DH 9, 26 and 27 and AP 67. They show a pattern of brittle, bedded limestone dipping at 45° and broken into small pieces in the course of the drilling operation.²⁸⁸ A zone of red clay is depicted in Drill Hole DH 27.

Based upon the data available and an adequate site investigation, we find that a prudent contractor would have reached the following conclusions. First, it would be working bedded rock.²⁸⁹ The beds persist to considerable depth and are close together, averaging perhaps one foot between beds and decreasing to an inch or two in some cases.²⁹⁰ The rock breaks readily along the bedding planes. Many of these planes have material of a shale, clay, or gouge nature between them at shear zones or shear planes.

In our view, a prudent contractor would also have ascertained from an adequate site investigation and interpretation of the subsurface data that the bedding descends into the valley floor stream channel in the left abutment and away from the stream into the right abutment at an angle of approximately 45°. The prominent joint systems in all of the areas of open cut are running at approximately right angles to the bedding planes, which are closely

spaced.²⁹¹ The combination of bedding and jointing is such that structures cut in the general attitude of both the spillway and outlet works stilling basin will have bedding and jointing coming together at right angles with the base tipped up at approximately 45°. This produced a serrated effect in the floor of the excavation.²⁹²

Moreover, the numerous references to thin bedding, broken rock, the presence of clay, shale and gouge in bedding planes where the beds have slipped back and forth against

²⁸⁹ The numerous bedding planes are evident as they dip into the formation and into the hillside in the background of Government Exhibit B-583 which is a panorama of the right wall of the spillway excavation looking downstream. Closer views may be seen in Government Exhibits B-364, B-365, B-425, B-428, B-579, B-581 and B-585. A cross-section view of the rock and of the effect of bedding on the rock is shown on Government Exhibit B-445, a section taken across the outlet works at approximate Station 15+55 and the spillway at approximate Station 8+55.

²⁹⁰ A graphic exemplification of the bedding is found on Government Exhibit B-444. The consistent bedding pattern from the left side of the outlet works excavation (right side of the photograph) through the ridge between the two stilling basins and continuing through the right side of the spillway excavation (left side of Exhibit B-444) is clearly visible.

²⁹¹ The results of the interrelated bedding and jointing on the base of the completed excavation at the top of the spillway are shown on Government Exhibit B-427. Government Exhibit B-363 shows the base of the excavation further down the spillway at approximate Station 4. Further down the spillway the bedding and jointing are marked on Government Exhibit B-428. At the bottom of the spillway the bedding and jointing are visible on Government Exhibits B-431 (a panoramic view of the excavation from the cutoff walls at the end of the spillway) and B-433 (the opposite cutoff wall, on the left side).

²⁹² The serrated or "sawtooth" excavation was sketched by Mr. Logan on Government Exhibit B-441. Government Exhibit B-363 is an example of the serrated excavation in the spillway.

²⁸⁷ The outlet works excavation is shown in Appellant Exhibits C-115, C-116, C-117 (1 through 6 and 10), and C-158 (1 through 4) and in Government Exhibits B-356, B-357, B-434 through B-436, and B-574. See also Appellant Exhibit C-156.

²⁸⁸ Drill Hole DH 13 somewhat above the top of the beginning of the outlet works excavation also exemplifies the general picture of broken and stained limestone.

each other as the mountain was created, and the presence of joint systems on top of the bedding planes are indicative of the stress to which the area was subjected. The rock, also, is brittle. It is shown to be broken at great depths below the surface.²⁹³

Accordingly, we find that from the subsurface investigation data available and an adequate site investigation,²⁹⁴ a substantial amount of rock excavation should have been anticipated by the appellant. Based upon such data we also find that a contractor reasonably could have anticipated that a thin-bedded, hard, broken and brittle limestone foundation would be encountered which would be very susceptible to a large amount of displacement and shattering when disturbed by blasting or ripping and that a very substantial amount of overbreak could be expected unless considerable caution was exercised when blasting or ripping to confine the lines and grades of the finished excavation.²⁹⁵

²⁹³ E.g., 90 to 210 feet on Drill Hole DH 1.

²⁹⁴ An adequate site investigation includes the asking of questions about relevant matters not otherwise disclosed. *Vitro Corporation of America*, note 273, *supra*.

²⁹⁵ Appellant was compensated for the extra quantity of excavation resulting from the fault or slip plane which extends from the spillway excavation into the excavation for the outlet portal, mapped on Government Exhibit B-426. With respect to the overbreak in the bottom of the stilling basin, it was a reflection of the bedding dip. That is, the rock did not break off at the precise line and grade intended by the contractor. The explosive force from the blasting continued on down causing a significant amount of overbreak. As sketched on Government Exhibit B-598 the appellant was allowed to reduce the amount of concrete refill necessary by filling up the section between two required gravel drains with gravel.

We, therefore, hold that the volume of rock excavated was not in excess of that which should have been expected. As the general character of the rock which was actually encountered should have been anticipated, the conditions actually encountered are not considered to be "subsurface or latent physical conditions at the site differing materially from those indicated" in the contract, as provided in the Changed Conditions clause. For these reasons, appellant's claim for additional compensation and an extension of contract time is denied.

HARSH AND UNWORKABLE CONCRETE

Contractor's Position

The appellant's position is that the Government was responsible for harsh and unworkable concrete which created a serious disruption of the contractor's entire concrete operation as it affected the outlet works, the spillway and the other principal concrete structures (Appellant Posthearing Brief, 362). The appellant asserts that the Government furnished the sand and aggregate source, tested the sand and aggregate after processing and after batching, and controlled all concrete mix design and concrete batching at Lost Creek (Appellant Posthearing Brief, 400). Although the Government allegedly represented that it would design and furnish workable concrete, harsh, undersanded and unworkable concrete was consis-

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tently designed and furnished, according to the appellant. This harsh and unworkable concrete allegedly could not be placed at all in some instances and could only be placed with inordinate difficulty in other instances.

Moreover, according to the appellant, these problems were seriously compounded by the failure of the Government to take concrete slump tests ²⁹⁶ at the specified location and also to provide proper allowance in slump for the existence of air entrainment ²⁹⁷ in the concrete. As a result the concrete was allegedly too low in slump for proper placement.

It is the appellant's position that it furnished sand and aggregate from the source requested by the Government; that it furnished the means for measurement of moisture requested by the Government; and that the sand and aggregate were processed by it in a manner required to produce satisfactory concrete. Mr. Angel, who was in charge of the batch plant, testified that the Government was not able to provide design concrete mixes that would permit efficiency in the operation of the batch plant and in the making of concrete pours (39 Tr. 4361-62).

²⁹⁶ The consistency of concrete is measured by the slump test. The appellant complains of the Bureau's allegedly "inadequate slump allowances provided under its improper testing procedures" (Appellant Posthearing Brief, 390).

²⁹⁷ Durability, workability and other properties of concrete are improved by entrainment of from 2 to 6 percent air. Entrainment is accomplished by adding an air-entraining agent to the concrete mix, which results in the dispersion throughout the mix of non-coalescing spheroids of air.

Mr. Angel also testified that the Government "never had the right amount of water, and the truck could get down to the area placement and we'd have to stop and add more water" (39 Tr. 4362). This affected appellant's ready-mixed fleet operation in terms of tying up and delaying the trucks, according to Mr. Angel.

In its Posthearing Brief, at 379-80, the appellant asserts that after Bureau approval was given preparatory to pouring concrete in the tunnel, the appellant's plan of operation called for discharge of the concrete from the mixing trucks at the portals into a pumpcrete machine which would pump the concrete through a line consisting of sections of pipe and thence into place in the forms. According to Mr. Miller, water was put in the concrete mixing truck at the batch plant and this would be taken in the mixer to the pumpcrete machine and mixed, and water would be added to the mix under the direction of the Government inspector. In order to reduce the frequency of this occurrence, more water would be added at the batch plant. With respect to the mixes furnished at the pumpcrete machine at the tunnel portal, when the contractor wanted to add water, the inspector would not allow it (27 Tr. 3111).

The concrete designed and furnished for the tunnel was objectionable according to Mr. Miller, "the mixes being lean on cement and sand resulting in very harsh and unworkable mixtures." (18 Tr. 2036)

He testified that some of the mixes were very difficult to pump and the ones in the latter pours on February 24 and 25, 1964, could not be pumped at all (27 Tr. 3110-11).

In one instance, according to Mr. Miller, the pumperete suddenly stopped and the contractor was required to take the pipe sections apart, remove and waste the concrete inside the pipe, and clean the machine before it was able to resume the pour (18 Tr. 2038-39). This allegedly occurred because "this load of concrete * * * had been batched with a mixer of concrete containing one less sack of cement per cubic yard of concrete and the amount of sand in the mix had been reduced."²⁹⁸ The mix in question was under the control of Government personnel (18 Tr. 2040).

Mr. Miller testified that on each of the occasions when functioning of the pumperete machine was stopped by the harsh concrete mix it was necessary to waste approximately ten cubic yards of concrete, and the concrete pouring operation was delayed for up to six hours while the excess concrete was removed from the tunnel by hand and the pumperete machine was cleaned (18 Tr. 2047-49).

²⁹⁸ 18 Tr. 2040. Mr. Miller testified (21 Tr. 2368) that he was told by Mr. William Brin, Government inspector:

"* * * that in this lower floor portion it wasn't necessary to have concrete with as much richness as it was to have it higher up. * * * And I went down to the batch plant then to find out what the change was that had been made, and this is when my batch operator told me that a quantity of sand and cement had been taken out of the application * * *."

The allegedly harsh and unworkable concrete mixes furnished by the Government are also said to have caused problems relating to the falling away of the concrete from the slick line and consolidation in the forms. According to Mr. Miller, the stiffer the mix, the less tendency it had to flow of its own volition and the more difficult it was to move with vibrators (18 Tr. 2043). This would tend to hold pressure back against the pumperete machine and against the slick line by building up in front of it, so that the appellant had to put charges of "blow air" through to try to keep it shaking down (18 Tr. 2043-44).

In the course of blowing the air, the concrete segregated into particles, causing voids in the concrete which subsequently had to be patched and could not be consolidated by vibration (18 Tr. 2044). A number of techniques were used in order to patch the voids, all of which, maintains the appellant, were costly and time-consuming.²⁹⁹

Mr. Miller also testified concerning the allegedly improper testing for concrete slump which aggravated the problem of unworkability. In this connection the appellant cites this portion of Subparagraph d. (Consistency) of Paragraph 83, which relates to composition of the concrete:

* * * The slump of the concrete, after the concrete has been deposited but be-

²⁹⁹ One of the methods used was dry packing of concrete. Some voids were chipped out and actual forms were made and other concrete put in behind the forms (18 Tr. 2044).

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fore it has been consolidated, shall not exceed 2 inches for concrete in the tops of walls, piers, and in slabs that are horizontal or nearly horizontal, 4 inches for concrete in sidewalls and arch of tunnel lining, and 3 inches for concrete in other parts of structures. * * *

Here the appellant points specifically to the clause, "after the concrete has been deposited but before it has been consolidated" (Appellant Posthearing Brief, 384).

The appellant also relies on the following passage relating to slump, at 222 of the Bureau's *Concrete Manual*, a manual for the control of concrete construction (6th edition), attached to Volume III of its Posthearing Brief as Appendix Exhibit J:

Specifications as to slump require that slump tests be made at the point of placement, but proper control of batching operations requires frequent checking of consistency at the mixing plant. Slump tests are also made at the mixer on samples from which cylinders are cast. When the mixer is at a considerable distance from the forms, slumps should be taken occasionally on the same batch at the mixer and at the point of placement to determine the slump loss in handling.

The appellant here emphasizes the requirement that slump tests be made at the point of placement (Appellant Posthearing Brief, 384).

Messrs. Miller and Doak testified that the Bureau took its slump test not at the point of placement, as provided in the specifications, but at the point where the concrete mix was discharged from the mixer

into the pumperete machine.³⁰⁰ According to the appellant, the effect of taking the slump test at the discharge end of the mixer meant that the concrete would have greater slump (or be less firm) than it would have at the point of placement (18 Tr. 2042-43). Mr. Miller testified that it is more difficult to hold concrete to a particular slump at the point of discharge into the pumperete machine than at the point of placement (18 Tr. 2043).

Mr. Doak testified that the concrete lines extended from approximately 75 feet to approximately 600 feet in length. Since concrete loses about one inch of slump in traveling through the ordinary line (33 Tr. 3729), making the slump tests at the machine instead of at the point of placement had the effect of having the contractor use a lower slump than required by the contract, according to the appellant (Posthearing Brief, 391).

The appellant contends, at 386 of its Posthearing Brief, that on February 24 and 25, 1965, the Government furnished it with concrete mixes for the tunnel that were so unworkable that they caused the pumperete machine to cease functioning, thus halting the entire concrete operation for a substantial period of time. At this time the contractor was attempting to place concrete in a tunnel barrel section between Tunnel Stations 9+42 and

³⁰⁰ 18 Tr. 2042; 33 Tr. 3728-29. In Mr. Ryland's report to the Chief Engineer, he stated that the slump allowances are at the point of placement (Appellant Exhibit C-159, p. 6).

9+73. On cross-examination, Mr. Miller denied that the difficulty with the pumpcrete line resulted from insufficient lubrication with grout when an S-shaped pipe was added, as the line was moved from the floor to the arch portion of the pour (26 Tr. 2987-92). He explained that the pipe already was lubricated because concrete was pumped through it continuously as it was added. Mr. Miller asserted that the Bureau mix must have been responsible for stopping the machine inasmuch as concrete had been pumped through the S-shaped pipe until the new concrete arrived in the line.³⁰¹

According to the contractor, the "implacable and harassing character of the Bureau's program of furnishing harsh and unworkable concrete to the contractor carried forward in even greater extent" during Mr. Doak's supervision of construction of part of the tunnel, the spillway, the intake structure, and related structures, commencing in the Spring of 1964.³⁰² Mr. Doak testi-

fied that he had trouble with the concrete pours principally due to the harsh and undersanded concrete and low slump.³⁰³ In his view, the lack of proper slump, which resulted in less workability, constituted one of the critical problems in construction of the tunnel.

The appellant asserts that it sought to cope with the excessively low slump by adjustment of tension springs on the pumpcrete machine and by use of steel shear pins instead of brass shear pins.³⁰⁴ It maintains that, nevertheless, the machine was "frequently rendered inoperable by the unworkable concrete" (Appellant Posthearing Brief, 391). Appellant's position is that the machine will not handle harsh and unworkable concrete (35 Tr. 3901).

The appellant is also critical of the manner in which the Government performed the slump test. Mr. Doak testified that the slump test should be made on a solid, stable surface with a clean cone.³⁰⁵ The Government, allegedly, did not ob-

³⁰¹ 26 Tr. 2990-92. Based upon his analysis of the Bureau records for February 25, Mr. Steenberg testified that the mix supplied would clog the machine for the following reason. The first batch contained 508 pounds of cement; there was 36½ percent sand, instead of 37.1; and there was 33½ percent of 1½ rock, instead of 32.9. On the second batch, there were also 508 pounds of cement, the sand was reduced to 35.85 percent; the ¾ inch rock was reduced over 4 percent to 25.92 percent; and the 1½ rock was increased nearly 4 percent to 38.23 percent (46 Tr. 5224-25).

³⁰² The appellant contends that Mr. Miller had to be replaced as superintendent as a result of pressure from Government employees (43 Tr. 4849; Appellant Posthearing Brief, 388-89). Mr. Walsh testified (44 Tr. 4910) that:

"* * * a derogatory report was published in a monthly safety magazine [which] upset Mr. Miller and eventually caused our loss of

him as an employee * * *. [The Bureau's] safety newsletter stated a letter had been sent [complaining about Mr. Miller] to the contractor. No such letter was ever sent, and the story in its entirety to the best of my knowledge was fabricated." The newsletter is Appellant Exhibit C-125.

³⁰³ 33 Tr. 3723. Low slump tends to make concrete more stiff; higher slump is more workable (33 Tr. 3726).

³⁰⁴ 33 Tr. 3726-27. Mr. Doak testified that operation of the machine with such pins is not approved by the manufacturer (33 Tr. 3727).

³⁰⁵ An unstable surface could result in vibrating which would change the slump. When concrete adheres to the sides of the cone, because the cone is unclean, the concrete appears to have a greater slump than it would have with a clean cone (35 Tr. 3911-12).

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serve these standards. In Mr. Doak's view, the slump tests could have been taken at the point of placement inside the tunnel by various means, including measurement of the concrete from the invert pours, breaking of the slick (pipe) line, removal of concrete through the doors in the circular forms, and removal of concrete at the bulkhead (37 Tr. 4118-22).

As a consequence, the contractor asserts there were numerous instances of disruption. Thus, the contention is made that the Government unfairly charged the appellant with refusing to pump concrete "at or near the two-inch range for the invert" (Appellant Exhibit C-159, p. 6). Appellant's pump-concrete operator, however, refused to pump the concrete in question because it had not been tested to find out whether it was near the two-inch range (34 Tr. 3879).

Another alleged problem occurred with concrete which was required to have two-inch slump on the second pour up the side of the mountain from the stilling basin in the spillway. Mr. Doak testified that the "concrete was absolutely beyond workability, it was so stiff that you could hardly tramp it into place * * *" (34 Tr. 3880). He slowed up the pour, took approximately two inches off the top, poured more concrete on and re-finished the area. In Mr. Doak's view, when concrete is so harsh that it has to be tramped into place, it is not possible to get a good finish on

it, nor can it be "rodded off" successfully.³⁰⁶

The reinforced concrete intake structure, which is approximately 32 feet high and is located outside the upstream tunnel portal, was the scene of still another problem allegedly caused by the unworkable concrete.³⁰⁷ Mr. Doak testified that the reinforcing steel bars spaced across the bottom and top and the vertical bars through the same area made it "almost impossible to get the concrete into the columns and * * * the vibrators" (34 Tr. 3824). According to Mr. Doak, the maneuverability of the concrete was affected by the size of aggregate and the amount of sand and cement; slump was therefore a factor here also.

The appellant had difficulty getting the kind of concrete that would work itself around the reinforcing steel. Mr. Doak testified that the Government provided a rough mixture which resulted in a honeycombed surface on the concrete on the intake structure.³⁰⁸ The honeycombed condition had to be corrected.

³⁰⁶ 34 Tr. 3880-81. Rodding (or screeding) concrete off means striking off concrete by means of a rod to make it smooth on top after it has been poured (34 Tr. 3881).

³⁰⁷ The appellant also asserts, at 394 of its Posthearing Brief, that "Bureau steel design was improper for the concrete having the specified aggregate size. This circumstance itself caused severe difficulties in placement in the column pours." This aspect is taken up in the discussion of steel *supra*.

³⁰⁸ 34 Tr. 3825. Mr. Doak testified that honeycomb "is an area most usually described as a surface area, whereas the aggregate most generally is showing and the voids are not filled between the larger pieces, that are larger aggregates."

According to the appellant, the conventional method of repairing honeycombed concrete is to chip out the area and then patch it with patching material, gunite, or a mortar gun (34 Tr. 3825). The Government, however, would not allow appellant to use a mortar gun to patch the intake structure. Rather, Mr. Doak testified, appellant in most cases had to "chop the concrete back," thus encountering steel, "which meant we must go an inch to an inch and a half beyond the steel" (34 Tr. 3825-26). Then, it had to be filled with new concrete. In all, somewhere between 15 and 20 percent of the intake structure had to be reworked in this fashion (34 Tr. 3826).

Mr. Doak testified that the method of patching used frequently created a bigger void than existed originally (34 Tr. 3826). He expressed the opinion that such patching tended to weaken the structure. He also stated that patching performed by the conventional method would have been cheaper and faster.

The appellant also contends that the Government interfered with its concrete operations under Mr. Doak, as it had with those under Mr. Miller. The Government allegedly had approved the contractor's use of steel forms for tunnel concrete without windows, in the upstream portion of the tunnel. In April 1964, however, Mr. Ryland is said to have required that the forms be modified by inserting holes in them (33 Tr. 3736).

The appellant asserts that the results of the pours in the original forms were superior to the results achieved with the changed forms (33 Tr. 3736-37). Where the windows were used, doors were put in that allegedly made the pours less accessible. Mr. Doak testified that the door had to be closed, but the form was not tight and grout would seep out around the edges of the door, causing a sanded area in the concrete (33 Tr. 3737). These areas thereafter had to be ground and fixed by means of hand patching.

The appellant contends that as a result of Mr. Ryland's direction it had to modify the existing forms by burning off the bottoms and also had to acquire additional forms (43 Tr. 4815). Mr. Walsh testified that the cost of cutting up, burning and replacing the forms was \$14,000 (43 Tr. 4816).

Further difficulty occurred when the contractor poured concrete in the stilling basins for the outlet works and spillway in August and September 1964. According to the contractor, not only was the concrete devoid of slump and undersanded, but the Government caused innumerable delays.³⁰⁹ The appellant allegedly had similar problems with undersanded concrete in its spillway operations in June 1965.³¹⁰

³⁰⁹ Mr. Doak's diary entries (Appellant Exhibit C-104) show that on August 26, 1964, the pour of the outlet floor occurred after 14 1/2 hours of check out, and on September 5, 1964, the contractor was stopped, after it had authorization to pour, on the ground that there were too many fines present.

³¹⁰ Appellant Exhibit C-104 (June 29 and June 30, 1965).

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Mr. Steenberg's Testimony

The most authoritative witness presented by the appellant in support of its concrete claim was Mr. Steenberg. Mr. Steenberg testified that he had been engaged in the construction business for forty years. He estimated that 90 percent of the work he performed when he was in the field dealt with concrete.³¹¹ He said that the concrete work in Lost Creek was no more difficult than the work appellant had done in the past (46 Tr. 5184).

Mr. Steenberg reviewed the concrete records of the Bureau relating to the Lost Creek project (46 Tr. 5185-86). These records included concrete mix data, batch plant records, test laboratory records, and inspector's reports (46 Tr. 5186). He thereupon prepared an annotated columnar tabulation of the Government data (Appellant Exhibit C-212) and an accompanying narrative explanation (Appellant Exhibit C-212A).³¹²

Mr. Steenberg testified that the yield of concrete yardage was undependable. The calculated cubic

yards varied from about 0.96 to 0.103 of the batched yards, according to him (46 Tr. 5190). This is said to indicate that the Government either did not "know in advance" or was "not batching in advance" a mixture that would actually produce a yard (46 Tr. 5190). As a result, appellant's foreman was uncertain about the quantities of concrete he was going to get. Moreover, the Government was allegedly not able to stabilize a mix that would produce a dependable yard (46 Tr. 5190). The effect of an undependable yardage yield on construction operations was to cause delay while additional concrete was transported or any excess concrete was wasted.³¹³

The appellant also maintains that the Government failed to provide any allowance for additional slump which might be required because of the existence of air entrainment.³¹⁴ Mr. Steenberg testified that "[b]ased on the inch-and-a-half of aggregate, which about 99 percent of all the concrete was, the air entrainment was supposed to be four and a half percent, plus or minus

³¹¹ 46 Tr. 5181. Mr. Steenberg testified (46 Tr. 5180):

"Q. How much experience have you had in reinforced concrete work?

"A. I've, so to speak, been raised in it and been in it ever since, either direct or in the position of supervising it from the office."

³¹² The tabulation was prepared separately for each structure with pertinent data indicated for each concrete pour for the particular structure, including the quantities of the design components by weight or percentage, the water-cement ratio of the concrete (with amounts of water batched and added in the field), concrete strength, the weights of the components of the grout (or lubricating) mix, and the quantities of the concrete batched, used and wasted.

³¹³ 46 Tr. 5190-91. Mr. Steenberg found from his examination of the Bureau records that Bureau inspectors were estimating waste on virtually every pour (46 Tr. 5192).

³¹⁴ Appellant Posthearing Brief, 402. The contractor cites the following passage from p. 257 of the *Concrete Manual*, referred to *supra*:

"* * * [P]articularly for successful delivery through long lines, it should be noted that air-entrained concrete may require somewhat more sand and perhaps an inch greater slump than would likely be necessary without air entrainment. These are required to offset reduction in workability as a result of compression of the entrained air while the concrete is moving in the pipeline."

one percent." According to him, however, Bureau personnel did not adhere to that standard and air entrainment varied from 1.3 percent to 10½ percent, which is both below and above the allowable limit (46 Tr. 5194).

Mr. Steenberg testified concerning appellant's contention that the concrete was undersanded and difficult to pump. He stated that in order to make "a good workable mix," particularly where pumping is involved, there must be at least 37 percent sand (46 Tr. 5198). In his view the Bureau did not adhere to this standard for pumpability, but undersanded most of the time (46 Tr. 5199).

Mr. Steenberg also addressed himself to the effect of an improper water-cement ratio upon the unworkability of the concrete.³¹⁵ According to his testimony, the lower the water-cement ratio, the greater the strength or durability.³¹⁶ For this reason, under Paragraph 83c., the water-cement ratio of concrete exposed to frost and weather is 0.47 and that of concrete underneath the water or permanently underground is 0.60.

Based upon his review of the testing data, Mr. Steenberg stated that the water-cement ratio calculated by the Bureau improperly included the water in the aggregate. He said that the 0.60 standard was not applied anywhere in the tunnel, where

³¹⁵ The combination of cement and water acts principally as the lubricant, according to Mr. Steenberg. (46 Tr. 5199).

³¹⁶ 46 Tr. 5200: The water-cement ratio is based upon the water in proportion to the cement exclusive of the aggregate.

it should have been allowed, but rather the Bureau adhered to a standard of below 0.53. This resulted in drier concrete than permitted by the water-cement ratio.³¹⁷

With respect to appellant's contention that the Government imposed consistently low slump upon it, Mr. Steenberg testified that the permitted slump in the round sections of the tunnel was four inches.³¹⁸ He examined Bureau slump records pertaining to the tests that were taken and recorded at the point of discharge from the concrete truck. He stated that even without allowance for air entrainment and pumping, the slump was lower at the truck than the slump that was permitted in the structure.³¹⁹ According to Mr. Steenberg, the slumps were only 2½ to 3¼ inches at the truck, instead of 4 inches at the placement area (46 Tr. 5202).

He found no indication that the Bureau inspectors allowed an inch of additional slump for air entrainment and an extra half inch to an inch for the loss of slump between the point of discharge and the point of placement (46 Tr. 5204).

Mr. Steenberg testified with respect to the alleged disruptive ef-

³¹⁷ 46 Tr. 5200-01. Mr. Steenberg testified (46 Tr. 5201):

"The water cement ratio of the mix was consistently on the underside. * * *"

³¹⁸ 46 Tr. 5201. This slump was to be measured at the point where the concrete was in place before it was vibrated. The concrete in question had air entrainment in it.

³¹⁹ 46 Tr. 5201-02. On May 8 or May 11, at Station 6+40 to 6+70, the slump varied from 2½ to 3¼ inches in spite of the fact that from 0 to 15 gallons of water were added per load (46 Tr. 5202).

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fects resulting from the Bureau's adjustments of water mix at the trucks, which appellant contends were necessary in order to attain the excessively low slumps required by the Bureau.³²⁰ The appellant asserts that the Bureau was unable to arrive at the proper water ratio at the plant and consequently adjustment was made in the field (46 Tr. 5203).

According to Mr. Steenberg, it is time-consuming to (i) check the slump at the truck, (ii) add water thrown in by the pailful and (iii) then run the truck for two or three additional minutes to mix the water. His contention is that if repetition of the test indicates that insufficient water was added, the whole process must be repeated. In the meantime the operator of the pumperete machine must slow his operation but not completely (or the concrete will freeze in the line). As a consequence, the pumperete operation, the people unloading the concrete, the truck drivers, the crew placing it, the crew at the batch plant, and the equipment are all idle for the length of time required to "water up" the concrete (46 Tr. 5203-04).

From his analysis of the Bureau's

³²⁰ Mr. Doak testified that the contractor installed a moisture meter in order to measure the moisture in the sand (34 Tr. 3883, 39 Tr. 4356). He also stated as follows (39 Tr. 4356):

"Q. Did you then give the Bureau everything they requested in the way of devices for measurement of water?

"A. Yes * * *.

"Q. And was that the moisture measuring device that the Bureau wanted?

"A. Yes.

"Q. Did they ever ask for any different or additional systems for measuring sand moisture?

"A. No."

compression tests,³²¹ Mr. Steenberg concluded that the Government personnel who controlled the mix did not know how to set up the batch mix and how to take the tests in the field. This conclusion was based upon a range of compression tests varying from 1,720 pounds to 6,600 pounds, PSI on the cylinder, which Mr. Steenberg stated "is the worst I have ever seen in my 40 years' experience" (46 Tr. 5220). He expressed the opinion, based upon his analysis of the Bureau's concrete records, that the Bureau personnel in charge of controlling and supplying the concrete mixes to the contractor were "either utterly incompetent or deliberately trying to mess up things by jumping the mixes back and forth * * *" (46 Tr. 5227).

The Government's Position

The Government, first, seeks to minimize the contractor's claim by alluding to the paucity of complaints respecting concrete during construction (Government Post-hearing Brief, 542-43). Its point is that the contractor remained remarkably quiet while the job was being done, for one allegedly so aggrieved.³²² The Government asserts

³²¹ Mr. Steenberg said that unlike other jobs performed by the contractor, the Bureau did not advise the contractor with respect to any compression test limit the contractor was expected to meet (46 Tr. 5220).

³²² According to the Government, the only evidence of substance with respect to a grievance by the appellant in this connection was a request, dated March 3, 1964 (Appellant Exhibit C-110), for permission to use $\frac{3}{4}$ inch aggregate, instead of $1\frac{1}{2}$ inch, and more

that although Mr. Angel maintained a diary he did not record any difficulties with the aggregate source or at the batch plant. According to the Government, it is also significant that there are only a few references in Mr. Doak's diary to concrete being hard to work.³²³

Thus, asserts the Government, the contractor did produce aggregate from the source provided by the Government "without a murmur of protest" as to deficiencies in the source or the amount of processing that was required; the Government did accept these aggregates, whatever their deficiencies in grading and moisture content and proceeded to design a mix around these aggregates, adjusting the mixes as data from surface moisture and gradation in the aggregates (prior to entering the mix) dictated; the contractor mixed the concrete in accordance with the Government's decision; and the concrete was placed, measured for payment, and paid for under the bid items "without an inordinate amount of jawbone at the time." (Government Posthearing Brief, 543-44.) Now, maintains the Government, the appellant seeks, "in the obscure light of hindsight,"

cement per cubic yard of concrete in the curved portion of the tunnel (Government Posthearing Brief, 543). The request was initiated by the refusal of appellant's new pumperete operator, Mr. John Tri, to attempt to pump material that he did not think could be pumped in the machine (18 Tr. 2046-47).

³²³ The Government also refers to the absence of a record of such complaints by the contractor in the diary of Mr. Wilcox, who was characterized as "in the habit of recording any and all complaints by the contractor, however small." (Government Posthearing Brief, 543.)

to say that nothing went right with the entire operation.

The Government admits that adjustments in the mix were made "daily and sometimes more often" but claims they were necessitated by reason of the appellant's deficient moisture control and aggregate grading. It concedes that each and every mix adjustment was not made solely because of the variations in surface moisture in the sand and coarse aggregates as they entered the mix or the improper gradation of these materials with respect to oversize and undersize particles within the designated sizes, but maintains that the majority of adjustments were made for these reasons (Government Posthearing Brief, 545, 569). The Government's position is that the problem that occurred in the mix design was worked out in the field in cooperation between Government and contractor personnel. Accordingly, it contends that the Government cannot be held responsible for the appellant's share of the costs incident to such effort.

The major thrust of the Government's argument is that under the contract it was afforded the right to design, test, adjust and control the mixes. The pertinent provision referred to is contained in Subparagraph c., dealing with mix proportions, of Paragraph 83, which relates to concrete composition:

The proportions in which the various ingredients are to be used for different parts of the work shall be as determined from time to time during the progress of the work and as tests are made of samples of the aggregates and the resulting con-

crete. The mix proportions and appropriate water-cement ratio will be determined on the basis of procuring concrete having suitable workability, density, impermeability, durability and required strength, without the use of an excessive amount of cement.

* * * * *

Tests of the concrete will be made by the Government, and the mix proportions shall be adjusted whenever necessary for the purpose of securing the required economy, workability, density, impermeability, durability, or strength, and the contractor shall be entitled to no additional compensation because of such adjustments.

Conversely, maintains the Government, control of both moisture content and aggregate grading was the sole responsibility of the contractor. The applicable provisions are said to be contained in Paragraphs 87a., 88a., and 83d.

Moisture Control

Subparagraph 83d., entitled "Consistency," provides:

The amount of water used in the concrete shall be regulated as required to secure concrete of the proper consistency and to adjust for any variation in the moisture content or grading of the aggregates as they enter the mixer. * * * Uniformity in concrete consistency from batch to batch will be required.

Subparagraph a. of Paragraph 87, relating to sand, provides:

* * * * *

Sand, as delivered to the batching plant, shall have a uniform and stable moisture content.

The Government contends that surface moisture variations in the aggregates affected the mixes and required the adjustments which

were made in them. In support of this contention, the Government relied mainly on the testimony of Mr. Borden, who was experienced in concrete and tunnel construction. Mr. Borden was called upon to explain several tabulations (Government Exhibit B-557) which he had prepared, based upon batch plant records and inspectors' reports, using the operations on May 8, 1964 as an example.³²⁴

He testified that an upward adjustment in the weight of sand for a three-yard mix, from 3,429 pounds to 3,459 pounds, was in part accounted for by the amount of free moisture in the aggregates before they enter the mix (78 Tr. 8754-55).

Mr. Borden also testified regarding the manner in which surface moisture variations in the aggregates allegedly affected the mixes and required adjustment thereof. His testimony related to a chart (Government Exhibit B-560) recapitulating the recorded surface moisture in the aggregates taken from concrete aggregate tests run on the test batches between October 1963 and September 1965. Examination of the chart indicates that there were variations in surface moisture contained in the sand and aggregate fractions in the mix.

The Government asserts that the most significant variations occurred

³²⁴ The tabulations were also based upon Government Exhibit B-555, entitled "Concrete Mix Computations Sheet", which was the underlying document for the Government's design activities at the batch plant, with respect to Mix No. 4H. The batch plant records and inspectors' reports (Government Exhibit B-557) were derived from B-555.

with respect to sand, where the amount of moisture runs from about eleven percent to about three percent. Substantial variations are shown for the sand during the early part of May 1964.

Mr. Borden also described the effect that variations in moisture in the sand have on workability. He testified that the amount of moisture in the sand affects the amount of sand, so that the presence of twelve pounds of moisture, for example, would mean there were actually twelve pounds less of sand (78 Tr. 8792-93). According to Mr. Borden, if there is too much moisture the slump and mix become overly wet (78 Tr. 8793); if there is not enough moisture, workability is affected (78 Tr. 8793).

Aggregate Gradation

The Government refers to the contractor's responsibility for supplying sand in accordance with certain gradation requirements provided for in Paragraph 87c. Subparagraph 87c. reads:

Grading.—The sand as batched shall be well graded, and when tested by means of standard screens (Designation 4), shall conform to the * * * limits
* * *

set forth in a table showing various screen sizes and the individual percent by weight retained on the screens.

The Government also cites subparagraph c. of Paragraph 88 (Coarse Aggregate) which provides:

Separation.—The coarse aggregate shall be separated into nominal sizes and shall be graded as

set forth in a table showing, for $\frac{3}{4}$ inch and $1\frac{1}{2}$ inch aggregate, respectively, the nominal size range and minimum percent retained on the screens.

Mr. Borden testified in connection with a chart (Government Exhibit B-558) which he had prepared showing the manner in which the amount of oversize and undersize materials in the various aggregates affected the scale batch weights for a given day (May 8, 1964) and required a mix adjustment.³²⁵ According to the chart, the dry batch weights (scale weight with free moisture removed, or saturated surface dry), when recomputed from aggregate and moisture tests run on the same day (Government Exhibit B-557, p. 3), show a variation with the dry weights indicated on the "Pounds per batch" line (c), on page 1 of Government Exhibit B-557.³²⁶

Consequently, asserts the Government, the mix design made on the record batch (the fifth line of page 2 of Exhibit B-557) was required in order to correct for free moisture in the aggregates and the amount of oversize and undersize material contained in the various aggregates (Government Posthear-

³²⁵ Government Exhibit B-558 is a somewhat more simplified version of the concrete mix data contained on Government Exhibit B-557, p. 3.

³²⁶ 78 Tr. 8750-63. Some of the Government computations were found to be in error and were corrected (78 Tr. 8752-54, 8757, 8759-63).

ing Brief, 583). The Government, therefore, contends that this is unmistakable evidence that the adjustment in the mix which was made on the fifth batch for May 8, 1964, was in part required because of inaccuracies in the aggregate gradings which are the appellant's responsibility.

Mr. Borden also testified at length concerning a chart (Government Exhibit B-559) purporting to show gradation data for aggregates used in every test batch.³²⁷ The gist of his testimony is that variations in significant oversize and undersize which exceed the limits set therefor in Paragraph 88 can be expected to affect the workability of the mix unless adjustments are initiated (78 Tr. 8799-8810). He also indicated that the slump and water cement ratio would be affected unless adjustments are made (78 Tr. 8806).

The Government contends that Mr. Borden's testimony regarding the variations in aggregate gradations, as portrayed on Government Exhibit B-559, and the manner in which the variations from the gradation limits specified can affect workability, has not been refuted by the appellant (Government Posthearing Brief, 584). It therefore maintains that the adjustments in mix design made by the Government

were justified in order to accommodate the gradation deficiencies in the aggregate, the responsibility for which fell upon the appellant (Government Posthearing Brief, 585).

Pumpcrete Operation

The Government's position is that the contractor's difficulty in the operation of the pumpcrete machines on February 24 and 25, 1964, was occasioned by the contractor. It asserts that movement of concrete in the pumpcrete line was stopped in order to permit a change in the discharge arrangement; the concrete was allowed to remain in the line for an uncertain amount of time, but probably long enough for the lubricating matrix to settle out from the mix or leak through the joints in the line; pumpcrete operation was then commenced, moving the concrete to the discharge end of the pumpcrete line; at this time there was a pressure buildup at the end of the slick line from a pile-up of the concrete through which the contractor was attempting to pump more concrete to fill cracks and crevices; as a consequence of all this, everything stopped.³²⁸ The Government concedes that as a result of the plugged pumpcrete line on February 24, approximately eight cubic yards of wasted concrete had to be

³²⁷ According to the Government, the chart purports to show, by means of dots and colored bars, those instances in which the aggregates in all of the test batches varied from the gradings required by Paragraph 88 for sand and also with regard to nominal oversize, significant oversize, nominal undersize and significant undersize for the coarse aggregates ($\frac{3}{4}$ inch and $1\frac{1}{2}$ inch) (Government Posthearing Brief 583-84).

³²⁸ Government Posthearing Brief, 587-88. The Government also asserts that on February 24, when appellant sought to force the concrete away from the end of the slick line by means of an air booster, hardened concrete was found in the pipe connection and no air could find its way through. As a consequence, Mr. Miller fired appellant's tunnel foreman who was responsible for cleaning the pipe (27 Tr. 3119-20).

removed from the pumpcrete line (Government Posthearing Brief, 589).

The Government also maintains that the pumpcrete machine was "in sore need of repair" and so when called upon to pump concrete which had not been in continuous movement through a 500-foot pumpcrete line, up through an S curve, through 25 more feet of line, into a flattened slick line and through wet concrete, all with enough pressure to push it back into cracks and crevices, "simply would not do the job." (Government Posthearing Brief, 591.) After Mr. Tri took over as appellant's pumpcrete operator, he overhauled the machine and the pour of February 24 was thereupon completed (a month later) without undue difficulty.³²⁹

Slumps

The Government asserts that the excessive variations in the slumps of which appellant has complained were closely connected to, and "almost always" a consequence of, the lack of moisture control and improper grading of aggregate (Government Posthearing Brief, 598). As for the appellant's contention that the slumps were excessively

low and accounted for harsh and unworkable concrete (causing placing difficulties and honeycombed concrete), the Government's position is that workability is a combination of sand, cement content and slump.

The Government points to what it regards as certain admissions by the contractor. On cross-examination, Mr. Doak stated that "we were held to the slumps as held in the specs * * * and not to be construed with the concrete manual * * *." ³³⁰ On another occasion, Mr. Prescott, appellant's tunnel foreman, was quoted as saying that concrete placement was made with lower slump than usual because he "likes" lower slump.³³¹ Mr. Doak also said that if concrete is too low in slump or is overslumped, a concrete machine will not be able to handle it (35 Tr. 3901). He admitted that the slumps specified by the contract are low slumps by the standards appellant was used to (36 Tr. 4078-79).³³²

The Government admits that most of the slump tests were taken at the site of the pumpcrete machine, as the concrete was being

³³⁰ 36 Tr. 4080. The Bureau concrete manual referred to was incorporated by reference in the contract only in certain places (36 Tr. 4080-81).

³³¹ Government Exhibit B-303, pp. 207-09. When asked about this statement, Mr. Doak replied (36 Tr. 4093): "I don't know what [Mr. Prescott] likes. * * * I don't recall talking to Prescott about this instance anyway."

³³² The Government contends that this was the real source of appellant's difficulty with this job. The contractor's experience was in the building trade and allegedly it did not expect "the type of rigid control over the concrete operation" that the Bureau maintained (Government Posthearing Brief, 598).

³²⁹ Government Exhibit B-303, p. 183 (March 24, 1964); Government Posthearing Brief, 590-91. Mr. Miller testified (20 Tr. 2268-69):

"A. * * * He didn't really overhaul the pumpcrete machine, but he just went through and checked it out very carefully as to the setting on these valves * * *."

"Q. (By Mr. Little). Do you know why he took it apart?"

"A. No, I do not. He was an expert on the machine and he was just told to go to it and go to work on it."

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dumped from the truck into the hopper, rather than at the point of placement (as called for by the contract) (Government Posthearing Brief, 599). The Government's position, however, is that the place where the slump tests were taken caused no harm to the contractor, and actually helped the contractor to avoid costly delays. Thus, Mr. Lasko testified (25 Tr. 2846):

*** [A]fter [the concrete is dumped] into the pumpcrete machine and *** at the placement * * * you find that the slump is incorrect, then what do you do with all the concrete in the pumpcrete machine and in the line? So therefore the slump is taken right at the point where it's placed into the pumpcrete machine to make certain that the good concrete * * * goes into the pumpcrete machine, and if any adjustments have to be made they can be made right there and mixed up in the truck and then put into the pumpcrete machine.

The Government's point is that taking slump tests at the point of placement in the tunnel would have been more difficult (37 Tr. 4119). Moreover, the Government maintains that no request was ever made by the contractor during performance that slumps be taken at a place other than the pumpcrete machine (Government Posthearing Brief, 603).

With respect to appellant's allegation that pumping through the pumpcrete line caused a decrease in the amount of slump, Mr. Bellport testified as follows (45 Tr. 5117-18):

"A. You don't lose much slump through a pumpcrete machine, Mr. Hart.

"Q. Only about an inch?

"A. No, not even that much.

"Q. Like on the end of your nose, distance gets pretty important on slump?

"A. Not once it's in the pumpcrete machine, it doesn't affect it much.

* * * * *

"Q. Well, let's assume some of the [lines were] 4-500 feet. Do you think that wouldn't affect the slump?

"A. It might affect it a little. I've seen concrete pump much farther than that without difficulty."

Finally, the Government addressed its alleged failure to allow additional slump for air entrainment. It asserts that the passage quoted from p. 257 of the *Concrete Manual* only indicates the possibility that some allowance should be made for additional slump because of the existence of air entrainment. The Government's position is that an additional allowance may not be necessary and an allowance that is required may be due to other factors (Government Posthearing Brief, 606-07).

With respect to Mr. Steenberg's contention that under Paragraph 85b., air entrainment was required to be plus or minus 4.5 percent, the Government maintains that there is no requirement that concrete will be rejected which does not contain that amount of air. Rather, according to the Government, 85b. merely calls for the amount of air entraining agent used in each mix to be such as will effect the entrainment of the percentage of air shown in the tabulation, including for 1½ inch maximum size coarse aggregate, 4.5 percent, plus or minus. The Government's position is that concrete

which does not contain that amount of air is not rejectable on that ground because 85b. only denotes the amount of agent to be used as an ingredient. Moreover, the Government asserts that the contractor could not have been harmed if the air content varied due to factors other than the amount of agent supplied since the Bureau controlled the mix (Government Posthearing Brief, 607).

Decision

At the outset it must be noted that the contracting officer's various findings of fact do not appear to have expressly covered all of the claims raised here. Extensive testimony, however, was taken at the hearing, accompanied by the introduction of numerous exhibits, and the Government has not questioned our jurisdiction over these claims. As reflected in the record, the contracting officer's adverse position towards them is clear. Under all of these circumstances, and in view of the magnitude of the record and the protraction of this appeal, no useful purpose would be served by remanding the claims to the contracting officer for additional findings.³³³ Accord-

ingly, we will proceed with our findings.

It is undeniable that the Government, under the contract, was afforded the right to design, test, adjust and control the mixes. Such right, however, is not unqualified. Implicit in the provisions is a requirement that it must be exercised reasonably with a minimum of disruption and delay.

On the other hand, control of both the moisture content and grading was the sole responsibility of the contractor. Therefore, the development of a plan to control the moisture content was within appellant's province. Use of a moisture meter alone was not sufficient. Appellant should have installed accurate measuring devices in several locations; or it could have protected its aggregate stockpiles from adverse weather by covering them or by using drains; or it could have processed its materials from a selected area where moisture was more uniform.

We find that the sand and coarse aggregate appellant provided did not comply consistently with the contract standards for moisture content and gradation. We are unable, however, to hold that the subsequent difficulties encountered by the appellant are attributable solely to the deficiencies in moisture content and grade. In our view, the Government did not exercise its right to adjust the mix proportions entirely free of fault.

The Government has admitted that each and every mix adjustment was not made solely for moisture

³³³ See *Conrad Incorporated*, ASBCA No. 14239 (January 21, 1970), 70-1 BCA par. 8116, at 37,689-90; *American Shipbuilding Co.*, ASBCA No. 6911 (May 12, 1961), 61-1 BCA par. 3046, at 15,762-63. In *American Shipbuilding*, the ASBCA said, at 15,763:

"* * * The chances in fact appear nil of any decision by the Bureau favorable to Appellant under Appellant's interpretation of the contract. To require Appellant to seek a fresh decision from the Bureau and again appeal would cause needless multiplicity of appeal proceedings for the sake of form."

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content or because of improper aggregate gradations.³³⁴ We infer therefrom that at least some of the adjustments that occurred were a result of Government conduct respecting mix design unattended by contractor responsibility. The record is not so compelling in this regard to require a finding that such adjustments were entirely within the zone of reasonableness imposed upon the Government. Neither can they be viewed in strict isolation from the complex of circumstances present here.

It is in the matter of slump, however, where we consider appellant's position even more persuasive. In the first place, slump tests are affected by adjustments in mix design. In this connection the Government also had admitted that not all variations in slump results reflected a need for adjustment in mix design resulting from improper control of moisture and aggregate gradation.³³⁵ Again we conclude that the record is not so compelling as to require a finding that the variations in slump test results were entirely free of Government responsibility.

The Government has conceded that it took most of the slump tests

at the site of the pumpcrete machine rather than at the point of placement, as required by the contract. While such a procedure may have benefited the contractor by reducing delay, we are not entirely convinced that the contractor was not adversely affected thereby.

The Government sought to minimize the effect of testing for slump at the pumpcrete machine rather than at the point of placement, but we note Mr. Bellport concedes that "a little" loss occurs between machine and placement.

Before altering the method of testing slump provided for by the contract, the Government should have tested slump at the pumpcrete and at placement in order to determine the amount of loss resulting from pumping. In the absence of such proof, on the basis of the entire record before us, a presumption of responsibility for appellant's difficulties with slump must be imposed upon the Government. That presumption has not been overcome by the evidence introduced on behalf of the Government.

We are also unable to attribute the ineffectiveness of the pumpcrete machine solely to the appellant. Rather, the state of disrepair may well have been induced by the quality of the mixes prepared by the Government. With respect to the plugging of the machine on February 24, however, we find that the source of the difficulty was the hardening of the concrete in the pipe connections resulting from the failure of appellant to clean the pipe.

³³⁴ Government Posthearing Brief, 545. The Government goes on to say, "We do believe, however, that the record shows that the vast majority of adjustments were made on this account." Again at 569 of its Brief, the statement appears that the reasons for numerous adjustments in the mix design were "almost entirely due" either to moisture content or improper gradation or both. (Italics supplied.)

³³⁵ Government Posthearing Brief, 598:

"* * * Variations in slump results reflected the need for adjustments in mix design which were almost always the result of improper control of moisture and aggregate gradation by the contractor." (Italics supplied.)

In the recent case of *Fenix & Scisson, Inc.*, the Corps of Engineers Board of Contract Appeals had occasion to pass upon a claim similar to that made by the appellant here that Government-designed concrete mix was deficient in pumpability and placeability.³³⁶ We regard their decision (at 40,001) as a particularly apt and succinct analysis of the issue before us:

The government wrote the specifications which permitted the wide variation of rock sizes in the coarse aggregates and the relatively large percentage of poorly shaped particles within the large coarse aggregate. It also reserved to itself the right to control the mix to adapt it to job conditions. In exercising that right it had the obligation to take into consideration the relevant factors of pumpability and placeability inasmuch as the contract required the use of a concrete pump. Of course the government was not required to design the concrete mix solely to suit the appellant's convenience or to assume the easiest pumping operation. But, it did not have the right to totally disregard the pumpability and placeability of the design mix to the detriment of the appellant's operation. On the record we find it did so.

Government counsel complains that appellant furnished inferior aggregates. But the evidence is that, although the aggregates may have been inferior, they were substantially within the tolerances permitted by the specifications. They were all that the government was entitled to under the specifications as written.

We find that the government by not properly taking into account the factors of pumpability and placeability in designing the mix, failed to discharge the duty undertaken by it * * * not to interfere with contract performance by the other party and, thereby, imposed upon appel-

lant more onerous conditions of performance than the contract required of appellant. A constructive change in the contract resulted.

We, too, find that the Government did not take into sufficient account the factors of pumpability and placeability in designing the mixes, as a consequence of which the mixes that were furnished appellant were difficult to work. We hold that a constructive change in the contract resulted. The appellant is entitled to be compensated for the ensuing delays and disruptions.³³⁷

³³⁷ Mr. Steenberg was unable to state the cost (46 Tr. 5207-09):

"MR. DURSTON: Have any calculations been made as to the amount of delay that was caused in this instance and the cost of that delay as far as lost time and use of equipment is concerned?

"THE WITNESS: We'd have no way to record that, unless we'd just had somebody standing out there keeping track.

* * * * *

"Q. Now, if you were called in as an expert * * * and it were described to you in detail, hypothetically, the conditions under which this concrete work was done * * *, would you * * * be able to testify as to the reasonable value of doing that work under such altered conditions and * * * an estimated basis under assumed conditions?

"A. It could probably be done, but it would be pretty impossible, unless somebody had some idea—the only thing you have actually to show overall delay is the pumpcrete machine is capable of pumping 20 to 25 yards an hour. This means that most of these tunnel sections—there's about 30 yards supposedly, plus the overrun should only have been an hour or an hour and a half pour, and in most cases these run four-five hours and in some cases six-seven hours.

"MR. DURSTON: It would even take an expert quite a while to assemble the necessary data in order to come up with a reasonable estimate of what the additional cost was because of the actual length of time that it took in excess of what would be a reasonable time to pour the concrete?

"THE WITNESS: That is right. The nearest you could possibly have hit—if you'd had any day when they didn't stop and make all these slump tests, if you could run one day,

³³⁶ Eng. BCA No. 2929 (November 30, 1970), 71-1 BCA par. 8607.

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The equitable adjustment will be determined in the portion of this opinion entitled "Equitable Adjustment."

Adequacy of Sand and Aggregate Source

At the hearing³³⁸ the appellant claimed that the Government misrepresented the suitability of Borrow Area No. 5 as a source of sand and aggregate having the required gradations. Mr. Angel testified that it contained an excessive amount of fines which resulted in additional cost of processing to the contractor (39 Tr. 4357). According to Mr. Angel, the appellant was required to utilize accessory equipment on its crusher in the form of shaker screens, spray bars, and sand screws "beyond what would be normally needed" on account of "the poor quality of" the material and to "get the clay out of the aggregate" (39 Tr. 4357-58).

The appellant contends that the Government represented in the

you'd have varied some hours to show what it took to do it under normal conditions, but I don't know of a day it wasn't messed up."

Delays to concrete pours as recorded in Bureau records kept by Bureau Inspectors are listed on a chart prepared by Mr. Britton (Government Exhibit B-492).

³³⁸ Department counsel took the position that such a claim had not previously been made to the contracting officer and that it should be dismissed for lack of notice. (42 Tr. 4644-45.) After the matter was brought up at the hearing the contracting officer issued (pursuant to request by the Board) a Findings of Fact and Decision, dated October 22, 1968, denying the claim. Attached thereto are Exhibits B-1000 through B-1014. It is pertinent to note that Exhibit B-1014 consists of 149 sheets of results of concrete aggregate tests.

specifications that Borrow Area No. 5 could feasibly provide sand and aggregate for concrete which would conform to the specifications. Paragraph 87 pertains to sand. It provides:

a. General.—The term "sand" is used to designate aggregate in which the maximum size of particles is 3/16 of an inch. Sand for concrete, mortar, and grout shall be furnished by the contractor from any approved source as provided in Subparagraph d. and shall be natural sand, except that crushed sand may be used to make up deficiencies in the natural sand grading. * * *

According to the appellant the following language in 87a. "constituted an express Bureau representation that the source described (Borrow Area No. 5) contained material of suitable quality which necessarily could by reasonable means yield sand of required quality and gradation" (Appellant Posthearing Brief, 363):

Bureau of Reclamation tests performed on a sample of sand taken from a source located in W 1/2 SE 1/4 Sec. 8, T 5 N, R 5 E, Salt Lake Meridian, approximately one-half mile downstream from the damsite, indicate that this source contains materials of suitable quality that can be processed to meet the requirements of these specifications for sand.

The quality and grading requirements for the sand are set forth in Subparagraphs b. and c. of Paragraph 87.

Paragraph 88 deals with coarse aggregate. It defines the term as follows:

a. General.—The term "coarse aggregate," * * * designates aggregate of sizes within the range of 3/16 of an inch

to 1 and ½ inches or any size or range of sizes within such limits. The coarse aggregate shall be reasonably well graded within the nominal size ranges herein-after specified. Coarse aggregate for concrete shall be furnished by the contractor from any approved source as provided in Subparagraph *d.* and shall consist of natural gravel or crushed rock or a mixture of natural gravel and crushed rock.

As with sand, the requirements of quality, nominal sizing and gradation for coarse aggregate were set forth. Similarly, according to the appellant, the following provision constituted an "express representation * * * relating to the suitability of Borrow Area No. 5 as a source for coarse aggregate" (Appellant Posthearing Brief, 364) :

Bureau of Reclamation tests performed on a sample of natural coarse aggregate taken from a source located in W ¼ SE ¼ Sec. 8, T 5 N, R 5 E, approximately one-half mile downstream from the dam-site, and on a sample of crushed rock from a rock source in SE ¼ Sec. 5, T 5 N, R 5 E. * * * indicate that these sources contain materials of suitable quality that can be processed to meet the requirements of these specifications for coarse aggregate.

The appellant then maintains that:

* * * prior to issuance of the Plans and Specifications * * * the Bureau knew that there were serious deficiencies in the materials located in Borrow Area No. 5 and that the required quality and gradations of sand and coarse aggregate could not reliably be produced therefrom. (Appellant Posthearing Brief, 365)

This knowledge was allegedly withheld from the contractor.

The Government's position is that Paragraphs 87 and 88 do not constitute representations as alleged by

the appellant but merely indicate that the sources referred to contain materials of suitable quality that can be processed to meet the requirements of the specifications (Government Posthearing Brief, 549). The Government asserts that there was no guaranty by it that substantial processing would not be required. Rather, it maintains the language of the specifications put the contractor on notice that processing was necessary.

The Government also contends that the specifications allowed the appellant to furnish material from alternate sources if Borrow Area No. 5 did not prove satisfactory.³³⁹ Thus, it maintains, the Government did not warrant the adequacy of the pit (Government Posthearing Brief, 551). As the appellant did not ask for approval of another aggregate source, it is the Government's position that the appellant must have concluded that whatever the difficulties in processing, Borrow Area No. 5 was economically the best source. Moreover, according to the Government, the source did prove adequate because the appellant did in fact procure material from it in sufficient quantity after processing with which to produce essentially all the concrete required under the contract.

In addition, the Government relies on Paragraph 35 of the specifications which provides that con-

³³⁹ Both 87a. and 88a. provide that the sand and coarse aggregate, respectively, may be furnished by the contractor from any approved source tested and approved in accordance with 87d. and 88d.

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struction materials test data for the project were available. From an examination of the grading analysis contained in these data (Government Exhibit B-406), it appears that the grading of the sand samples taken from Borrow Area No. 5 did not conform in all respects to the sand gradings required by the specifications. It is the Government's position that as a consequence the appellant was put on notice that grading problems could be expected. The Government also relies on the construction materials test data in responding to the contractor's charge that internal Government preaward reports confirmed the inadequacy of the source.

In his Findings of Fact and Decision, dated October 22, 1968, the contracting officer took the position that the appellant was not alleging that any portion of the aggregate processing work in Borrow Area No. 5 was changed or extra work (par. 5, p. 2). He therefore concluded that the claim is one of changed conditions only and treated it as such. He held that there was no changed condition present and denied the claim (par. 25, p. 10).

Decision

Under Paragraphs 87 and 88 the contractor is told that the sources of sand and aggregate located in Borrow Area No. 5 contain materials of suitable quality that can be processed to meet the requirements of the specifications. Therefore, the fact that some processing was necessary should have come as no sur-

prise to the contractor. The provisions contain no representation that only minimal processing will be required.

The very language of Subparagraphs a. of Paragraphs 87 and 88 indicate that the possibility of crushing should have been contemplated³⁴⁰ by the appellant. Examination by the appellant of the applicable construction materials test data available under Paragraph 35 would also have indicated that the grading of the samples taken from Borrow Area No. 5 did not conform in all respects to the gradings provided for in the specifications.

We have taken into account the appellant's utilization of Borrow Area No. 5 as a source of material, and the fact that it did procure sufficient quantities of material from that source, after processing.

We find that there were in existence at the site no subsurface or latent physical conditions differing materially from those indicated in the contract. We therefore uphold the contracting officer's determination that no changed condition is present here.

We note, also, the following finding by the contracting officer (par. 21, p. 9):

* * * * *

Graduation tests were made by the Government on material from the contractor's processing plant as the work-

³⁴⁰ 87a.: " * * * crushed sand may be used to make up deficiencies in the natural sand grading." 88a.: "Course aggregate * * * shall consist of natural gravel or crushed rock or a mixture of natural gravel and crushed rock."

progressed. Copies of the test reports are attached as Exhibit B-1014. A review of these test results indicates that approximately 20 percent of the finished product samples tested were also long on No. 8 material and short on No. 100 material.³⁴¹ In spite of this fact, none of the material from the contractor's aggregate processing plant was ever rejected by Government inspectors and although adjustments were made by the contractor from time to time to attempt to remedy this situation, indications are that the contractor was permitted to use a significant amount of material which was not within the required sand grading limitations.

We do not regard the relaxation of the requirements of the specifications as constituting a constructive change entitling the appellant to additional compensation. The claim is denied.

OIL PIPELINE BREAK

The appellant has requested additional compensation in the amount of \$15,315.13 and an extension of time of 12 working days for extra work and material allegedly attributable to a rupture of the Service Pipe Line Company's high pressure oil products line which occurred near its concrete batching facilities.³⁴² The break happened at approximately 3:45 p.m., on July 31, 1964, within a section of pipeline that had been relocated from the

reservoir area between May 15 and June 15, 1963.³⁴³

As a result of the rupture, oil was sprayed over the aggregate processing and batch plants, cement bin and parts of the aggregate stockpiles which had been located in close proximity to the high-pressure pipeline. Until the broken pipe could be replaced by a new section, concrete placement operations which were in progress on the outlet works intake structure and stilling basin (backfill of overexcavation) ceased.

Repair of the pipeline was accomplished by 8 a.m., on August 1, 1964, and concrete placement was resumed in the intake structure on August 3, 1964. Thereafter, by letter dated August 6, 1964 (Exhibit No. 32), the Government directed the appellant to halt operations in the vicinity of the pipeline in order to enable Service to relocate approximately 700 feet of its line. After the pipeline was relocated away from the batch plant the appellant was advised on August 13, 1964, that it could resume its operations (Exhibit No. 34). By 10:30 a.m., on that day placement of concrete in the access shaft began.

The appellant has alleged that it:

* * * suffered serious damage and disruption as a result of the oil flow from the pipeline break, including (a) damage

³⁴¹ That is, the samples contained more of the No. 8 material and less of the No. 100 material than is permitted in the final product under Paragraph 87 c. of the specifications.

³⁴² Appellant's claim letter is dated December 18, 1964 (Exhibit No. 112). A map showing the location of the pipeline is contained in Exhibit No. 219, p. 33.

³⁴³ The pipeline had been relocated by Service Pipe Line Company pursuant to Bureau Contract No. 14-06-D-3007, prior to award to the appellant of the contract here in question. As relocated the pipeline passed through the vicinity of the Government's designated sand and aggregate source (Borrow Area No. 5) and the eventual site of the contractor's aggregate processing and batch plants.

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to equipment and to sand and aggregate stockpile and borrow sources; (b) the costs of extensive earthwork to control the limits of the oil flow; and (c) shut-down of all aggregate processing and concrete operations on July 31 and most of the first two weeks of August.³⁴⁴

As set forth on Exhibit A attached to appellant's claim letter (Exhibit No. 112), appellant is seeking: (1) \$5,094 per "Batch Plant shutdown" and \$198 for "weekly rentals for equipment that sat idle"; (2) "Time lost hauling to crusher because of longer haul due to relocated and limited access to borrow area", \$498.40, and completion of crusher operation, \$996.80, totaling \$1,495.20; (3) "Cost to go around pipe because of new pipeline crossing", \$138.55; (4) Cost of maintaining stilling basin outlet structure, \$334.83; (5) "Materials ruined by oil", \$2,335.40; (6) "field direction and Overhead", \$450; (7) water pump change in Creek caused by pipeline going through creek and silting appellant's pump, \$68.63; (8) estimated cost of cleaning Batch plant at end of job, \$234; and (9) One week delay on concrete pour in spillways floor pour, \$750 and second wall upper pour, \$295, totaling \$1,045.

The broken pipeline which operated under a pressure of approximately 1,200 pounds per square inch had split in a longitudinal direction. The pipe had been gouged on top

along a line approximately 10° down from the break which extended across the break. There was also a dent along the side of the pipe (Government Exhibits B-386 and B-387).

It appeared that the gouge was produced by the operation of heavy equipment such as a backhoe or bulldozer. Apparently the gouge caused the failure of the pipe because of crack propagation under a fluctuating load. That is, the pipe in its weakened condition could not withstand the pressure to which it was subjected and the rupture thus occurred.

The contracting officer found that the pipeline was struck with a backhoe operated by an employee of the appellant while working in the vicinity of the batching plant (Exhibit No. 251, par. 222). He determined that this action was the proximate cause of the pipeline break.

In addition, he found that the appellant was the only contractor in the immediate vicinity performing construction work and concluded that "the striking or gouging of the pipeline could have been done only by the contractor's equipment" (Exhibit No. 251, par. 223). The contracting officer accordingly held that the appellant was "responsible for the damage to the pipe which in turn resulted in the pipe failure."

With respect to the appellant's overall claim, the contracting officer determined that \$10,387.58 of it was comprised of "delay" claims which

³⁴⁴ Appellant Posthearing Brief, 423. The damage and disruption are described by Mr. Doak at 35 Tr. 3924, 3926, and 3931.

he had no authority to entertain.³⁴⁵ These he denied for lack of jurisdiction; the balance he denied for lack of merit (Exhibit No. 251, par. 224). The contracting officer disallowed the time extension for the period (between August 6 through 13, 1964) that the work was suspended due to the pipeline break, on the ground that the period had already been covered by the time extension allowed in Order for Changes No. 1.

The appellant, however, alleges that neither it nor its subcontractor, M & S, performed any excavation operation at the location of the pipeline break. Rather, it contends that the pipeline was exposed to damage from equipment used in relocating the pipeline which occurred prior to June 30, 1963.³⁴⁶ Mr. Miller testified that he observed the pipeline relocation operation when he was at the project site prior to bidding. He saw a large ripper and backhoe being used to excavate for placement of the relocated pipe. The backfilling of the excavated ditch over the relocated pipe was performed with a bulldozer. He expressed the opinion that the damage to the pipe could have been caused either during the removal and han-

dling of the pipeline or by a bulldozer during the backfill operation.³⁴⁷

At the same time that the pipeline relocation work was taking place, a laboratory and office building were being constructed for the Bureau of Reclamation under Specifications No. 400-C-230 (Appellant Exhibit C-71).³⁴⁸ Associated with the construction of the building was a four-inch concrete drain pipe, identified as number 13 on Appellant Exhibit C-162. In order to construct the drain line a shallow trench had to be dug extending in a southeasterly direction from the building toward Little Trail Creek where the trench decreased in depth to a point where the drain pipe was exposed on the surface of the ground (64 Tr. 7059). Both Mr. Curd and Mr. Lasko agreed that the distance between the exposed end of the drain pipe to the point of the pipeline break was approximately 65 feet.³⁴⁹

The appellant thus takes the position that the pipeline was damaged in the course of one or the other of these operations over which it had no control or responsibility. Mr. Angel maintained that the dents could have been made months or even longer before the rupture oc-

³⁴⁵ These were: (1) idle equipment rental (batch plant), \$5,094; (2) idle equipment rental (concrete), \$198; (3) delay expense (Crusher), \$1,910.85; (4) delay expense (pumps, outlet works stilling basin); \$334.83; (5) delay expense (supervision and overhead), \$450; (6) delay expense (concrete in spillway), \$1,045; and (7) 15 percent profit, \$1,354.90.

³⁴⁶ Paragraph 59b. provides that " * * * pipelines traversing Borrow Areas No. 2 and 4 as shown on the drawings will be relocated by others prior to June 30, 1963." The relocation was necessary in order to remove the pipeline from the reservoir area.

³⁴⁷ 42 Tr. 4712-17. Mr. Lasko similarly testified on cross-examination that a Caterpillar D-9 with a ripper blade was used to open the existing pipeline trench and that both a backhoe and bulldozer were used for backfilling the trench into which the relocated pipeline was placed (66 Tr. 7240-42).

³⁴⁸ The location of the building is marked with a number six on Appellant Exhibit C-162.

³⁴⁹ 43 Tr. 4791; 64 Tr. 7059. Mr. Curd and Mr. Lasko scaled off the distance on a map of the area (Appellant Exhibit C-162).

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curred (39 Tr. 4382). Appellant suggests that the dent could have been caused by a bulldozer during the backfilling of the pipeline trench.³⁵⁰

The Government, however, maintains that the "proximate cause of the rupture in the pipeline is in the realm of 'res ipsa loquitur'." (Government Posthearing Brief, 538) It asserts that there is no evidence in the record establishing positively the instrumentality that caused the damage to the pipeline.

The Government's position, as stated on 539 of its Posthearing Brief, is that the pipeline was relocated prior to the time the contractor set up its batch plant and other concrete facilities and that the appellant knew of its location. Nonetheless, according to the Government, appellant set up³⁵¹ its aggregate and concrete plant directly over the pipeline which was being operated under high pressure, even though there were many other areas available for the contractor to locate the plant and still be close to Borrow Area No. 5 (its aggregate source) and not impede its access to the dam site. The Government intimates that the appellant assumed the risk of the pipeline rupturing under such circumstances.

In addition, the Government points to the use of "heavy equipment" in the general area of the pipeline" by the appellant in the course

of setting up the facilities which, in addition to the concrete batch plant, included a rock crusher, a concrete storage pad with underlying heating pipes, a partially embedded condensation tank, a water well and several storage and maintenance sheds. Mr. Lasko testified that in clearing the general area where the facilities were later erected and aggregate and sand stockpiles were placed north of Borrow Area No. 5,³⁵² a front-end loader with a bucket that can be used as a dozer, backhoe, crane, crusher, and D-7 Caterpillar were used by the appellant (64 Tr. 7065-66). In addition, Mr. Lasko's diary for April 13, 1964, mentions some stripping being done by the contractor in Borrow Area No. 5 with a TD-25 bulldozer (Appellant Exhibit C-241, p. 104). Mr. Lasko's entry notes that the operator of the dozer, Mr. Nightingale, expressed the opinion that the cut he had made was too deep but that he was working in accordance with instructions from the batch plant operator.

The appellant, however, denies that the rupture was caused or contributed to through any fault of its own. Mr. Miller testified that while he was at the project he never saw any equipment operated by the contractor or M & S perform any excavation whatsoever within 30 to 50 feet of the place where the pipeline rupture occurred (42 Tr. 4722). Mr. Angel also testified that during

³⁵⁰ Appellant Posthearing Brief, 427; 39 Tr. 4382.

³⁵¹ Appellant began setting up the aggregate and concrete production facilities in September 1963.

³⁵² The locations are designated by numbers 1, 2, 3, 8, 9, 10 and 14 on Appellant Exhibit C-162.

the period of his presence on the job the appellant performed no excavation within 50 feet of the point of rupture either with a backhoe, dragline, bulldozer or any other piece of equipment.³⁵³ Mr. Lasko admitted that he never saw any equipment of the contractor or M & S excavating where the pipeline break occurred (66 Tr. 7244).

Decision

In holding the contractor responsible, the contracting officer relied on Clause 12 (Permits and Responsibilities) of the General Provisions. It reads:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits * * *. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which therefore may have been accepted.

Clause 12 is a risk allocation provision. At the outset it imposes liability upon a contractor for the cost of repairing damage to the work resulting from his fault or negligence.

³⁵³ 39 Tr. 4371. Mr. Doak also testified that during the time he was on the job, no backhoe or other digging instrument was used in the area where the pipeline break occurred, nor was there any trenching or ditching or excavation performed, or any grading or heavy equipment operated over the area where it would go to below ground surface (35 Tr. 3918-19).

In the last sentence of the clause is set out what the Court of Claims in *Edward R. Marden Corporation v. United States*, 194 Ct. Cl. 799 (1971), has characterized as "the normal rule as to 'builder's risk.'" Read literally it goes beyond mere liability for fault or negligence and makes a contractor responsible for damage to work performed before final acceptance. Although the language of this sentence is absolute in placing all risk on the contractor, the courts and boards have held that it does not make the contractor an absolute insurer, despite Government fault or negligence, of the work until final acceptance.³⁵⁴

The contractor's position, however, is that the Government was obliged "to provide [it] with safe and suitable working conditions free from unwarranted interference with construction operations."³⁵⁵ The Government is said to be responsible because it did not meet its "implied contractual obligation to provide a proper and safe construction site," citing *J. Young Construction Co., Inc.*³⁵⁶

In the *Young* case, the contracting officer found that a waterline

³⁵⁴ *Halvorson v. United States*, 126 F. Supp. 898, 900-01 (E.D. Wash. 1954); *George C. Puntun, Inc., ASBCA No. 9767* (July 23, 1965); 65-2 BCA par. 5007, at 23,609.

³⁵⁵ Appellant Posthearing Brief, 432. This is the "usual theory" on which Government liability is predicated in this situation. Grayson, *Risk Allocation under the Permits and Responsibilities Clause of the Standard Government Construction Contract*, 35 Geo. Wash. L. Rev. 988, 994 (1967); Nash, *Risk Allocation in Government Contracts*, 34 Geo. Wash. L. Rev. 693, 706 (1966).

³⁵⁶ ASBCA No. 10761 (April 29, 1966), 66-1 BCA par. 5551; Appellant Posthearing Reply Brief, 71.

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rupture was not attributable to any fault or negligence on the part of the contractor or of the Government, but held the contractor liable for the cost of repairing the ensuing damage pursuant to Clause 12. Although unable to make a finding as to cause of the rupture, the Armed Services Board found that no act of the appellant contributed to the rupture and that the water main was under the exclusive control of the Government. It held, in line with the view expressed *supra* that a contractor under Clause 12 was not an absolute insurer of its work until final acceptance. The ASBCA determined that the damage to the contractor resulted from the Government's failure to discharge its implied contractual obligation to provide a proper and safe construction site through adequate maintenance of the waterline and sustained the appellant's claim for the cost of the repair work necessary, under the Changes Clause.³⁵⁷

We are of the view that the contracting officer here was unjustified in predicating appellant's responsibility upon a finding that its employee struck the pipeline with a backhoe which was the proximate cause of the pipeline break. As the Government conceded at 538 of its Posthearing Brief, the "Board has

no evidence in the record as to what instrumentality actually caused the damage to the pipeline."

It appears that on various occasions the appellant did have equipment working in the area of the pipeline break which may have damaged the pipe. The pipe undoubtedly could have been weakened at an earlier time, resulting in ultimate rupture. The appellant also elected to locate its aggregate and concrete plant over the pipeline, although the significance of this questionable judgment is considerably diminished by the failure of the Government to object.³⁵⁸ The case against the appellant is based upon speculation and conjecture. There is insufficient evidence to support a finding that the appellant was at fault.

This alone is not enough, though. A contractor in this situation must bear the burden of proving Government fault by a preponderance of the evidence.³⁵⁹ Here the appellant has failed.

The record simply does not establish that the oil pipeline break was caused by an instrument under Government control. Government liability is also grounded upon speculation and conjecture. Unlike *Young*, there is no evidence upon which to determine that the Govern-

³⁵⁸ 42 Tr. 4722; Government Posthearing Brief, 534.

³⁵⁷ ASBCA Chairman (now Court of Claims' Trial Commissioner) Louis Spector dissented (at 25, 954-55), on the ground that the Government was not contractually liable under the Permits and Responsibilities clause and that the builder's risk provided for therein was usually covered by builder's risk insurance; he regarded the claim as sounding in tort and remediable under the Federal Tort Claims Act.

³⁵⁹ *Charles T. Parker Construction Co.*, IBCA-328 (February 4, 1965), 72 I.D. 49, 53, 65-1, BCA par. 4663, at 22,301 ("Appellant has failed to sustain its burden of proof by a preponderance of the evidence; in support of its allegations that the blow-down of the towers was due to the fault of the Government.").

ment was responsible for the damage and thereby impeded the appellant in its work. We therefore find that the cost to the appellant of repairing the damage is not compensable under the Changes Clause.

The claim thus resolves itself into one of those cases concerning which the Court of Claims has said:

There are losses and misfortunes not due to the fault of anyone and their incidence cannot, therefore, be determined on the basis of fault.³⁰⁰

We hold that the risk of loss was on the appellant under the Permits and Responsibilities clause.³⁶¹ The claim, accordingly, is denied.

TERMINATION FOR DEFAULT

The date established for completion of the contract, pursuant to Paragraph 15, was September 29, 1965.³⁶² The appellant, however, did

³⁰⁰ *De Armas v. United States*, 108 Ct. Cl. 436, 467 (1947). Accord: *John McShain, Inc. v. United States*, 179 Ct. Cl. 632 (1967); *D. Gerald Bing, ASBCA Nos. 4437, 4584* (October 30, 1958), 58-2 BCA par. 1979.

³⁶¹ In this connection we note the following statement in *Marden, supra*, at 807:

"There is nowhere in the [Permits and Responsibilities] article a provision for a contract adjustment in the event that work or materials are damaged or destroyed. If plaintiff had been found by the board not to have borne the risk of the hangar's collapse, the board would not have been able to fashion an affirmative remedy for plaintiff under the Permits and Responsibilities article. The Permits and Responsibilities article does not even approach being the type of adjustment provision envisioned in *Utah*."

Here the appellant is seeking an adjustment cognizable under the Changes Clause and the Permits and Responsibilities article is not relied on by it for any affirmative relief, but by the Government as a defense thereto.

³⁶² By virtue of Change Orders 1 through 4 and Findings of Fact No. 1, time extensions were allowed to and including August 9, 1966.

not complete its work under the contract. By letter dated September 18, 1965 (Exhibit No. 206), it notified the Government that work was being discontinued. The letter reads in pertinent part:

Bureau estimates covering July and August work are current, conspicuous examples of a continuing calculated program of gross underpayment which has been involved in all prior Bureau estimates.

Moreover, we are particularly discouraged and disappointed that you have wholly failed to honor the promise contained in your letter of June 24, 1965, that the detail on the core trench claim submitted to you on June 22, 1965, would be promptly reviewed. * * * Since your initial change order on the Core Trench is typical of the inadequate relief we have received on valid claims and your failure to act on the additional claim detail is typical of the dilatory processing of claims which we have experienced throughout the contract work, it is apparent that we cannot expect any adequate relief on pending claims with any reasonable degree of promptness.

As indicated in my letter to you dated July 2, 1965, we have furnished your project engineer with complete data concerning our equipment. You have previously received numerous letters setting forth the legal and factual basis for the various items of our claim. You have our total Damage Summary in claims brochure presented to Commissioner Dornin. We have repeatedly advised you that fragmentary unit-price relief is inequitable and inadequate. You have refused to negotiate with us in order to afford timely relief to the contractor. Under these circumstances, the protracted disputes procedure, which you have insisted upon, is meaningless and futile for dealing with breaches of the scope and severity encountered on this job. It is now obvious that your continued and systematic failure and refusal to pay adequately or

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promptly for contract work and extra work or to act in good faith and with reasonable promptness on claims, constitutes, individually and in all its aspects, a breach of such substantial and severe extent that it is wholly unreasonable * * * to continue with the contract work awaiting redress for breaches already suffered.

The contractor has reluctantly concluded that due to numerous breaches of contract heretofore called to your attention and because of wrongful withholding of funds to which the contractor is entitled and reasonably requires for continued performance, it has become necessary to discontinue contract work because of your breaches of the contract.

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The contracting officer replied by telegram dated September 21, 1965 (Exhibit No. 209). He explained that he had withheld comment on the core trench claim until the appellant had had an opportunity to present the additional evidence referred to in appellant's letter dated July 2, 1965.³⁶⁴ The contracting officer pointed out that notwithstanding the contractor's failure to present evidentiary support for its claims, he had made "preliminary adjustments amounting to approximately \$177,000 on the basis of Government records alone * * *."³⁶⁵

The contracting officer then stated that he was "prepared * * * to issue

³⁶³ Appellant's letter dated September 23, 1965 (Exhibit No. 210) amplified the reasons contained in the letter of September 18, 1965.

³⁶⁴ In pertinent part the July 2, 1965, letter reads (Exhibit No. 186, p. 2):

"We are now proceeding with preparation of additional claims material supporting both admitted and contested liability items."

³⁶⁵ He also stated that with the exception of appellant's letter of June 21, 1965 (Exhibit No. 178), appellant had failed to provide any support for its allegations pertaining to change order inadequacy.

final decisions on [the] basis of [the] present record * * * [and] to consider any additional evidence you wish to submit," but stressed that "work must be continued while orderly claims procedure is followed as provided in [the] contract." He warned that unless the contractor "immediately" resumed work he would conclude that it was in default. The contracting officer gave the appellant until September 24, 1965, to advise that it would "immediately recommence construction operations," or otherwise the contract would be terminated for default. Thereafter, the deadline was extended to September 28, 1965 (Exhibit No. 211).

By telegram dated September 28, 1965 (Exhibit No. 212), the appellant stated that it would not resume work while the Government "remains in cardinal breach." The Government thereupon terminated the contract for default pursuant to Clause 5 of the General Provisions, by telegram dated September 28, 1965 (Exhibit No. 213).³⁶⁶

306 "5. TERMINATION FOR DEFAULT * * *

"(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work * * *.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another con-

In its notice of appeal from the termination, the appellant denied that it had "abandoned, repudiated or breached its obligations under the contract" (Exhibit No. 218). It characterized its position as being a "shutdown" or "suspension of work" resulting from the Government's breach and listed the various items of which it complained.

Essentially the appellant is contending that it was justified in leaving the job because the Government allegedly failed (1) to make timely payments,³⁶⁷ (2) to consider and act upon the contractor's claims in a timely fashion, (3) to consider the claim on a unitary basis, and (4) to grant adequate relief. Its position is that the cumulation of wrongful Government acts (that is, Government breaches of its contract obligations) entitled it to cease work pursuant to *Leary Construction Co. v. United States*, 63 Ct. Cl. 206 (1927). None of the other causes for delay mentioned in Clause 5(d) of the General Provisions have either been alleged or are in issue.

Whether appellant's conduct is labeled merely as a shutdown or suspension of work as asserted, rather than a repudiation or breach is in the nature of an immaterial semantic exercise. In our view it consti-

tuted an abandonment by the contractor and the question we must decide is, do the various alleged acts of the Government excuse the contractor?

The appellant contends that the impropriety of the termination and, conversely, the propriety of abandonment, cannot be fragmented into factual segments. According to the appellant, such an undertaking would be "unmanageable," but, more seriously, would not be meaningful in terms of the question of termination "because it was the interrelationship and cumulative effects of the totality of the occurrences at Lost Creek which brought about the demise of the Contractor" (Appellant Posthearing Brief, 459-61).

We do not subscribe to this view. The appellant has itself cast the various alleged acts of Government misconduct (or breach) into distinguishable factual fragments. We will, however, consider them singly and collectively, for it is conceivable that the total impact upon the appellant of the specific Government actions complained of justified a cessation of work even though, standing alone, each did not. We will first examine appellant's assertions *seriatim*.

Payments

It is well settled, as the Government has conceded, that a contractor is entitled to discontinue work when the Government has failed to make timely and proper payment in accordance with the terms of the

tractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers * * *."

³⁶⁷ Examples of alleged underpayment and wrongful withholding of payment are set forth in the appellant's Posthearing Brief, 440-43, and are hereinafter discussed.

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contract.³⁶⁸ During the course of its work the appellant frequently disputed the progress payments made under Clause 7 of the General Provisions which provides for "progress payments monthly * * * or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer."³⁶⁹ The appellant contends that there were "no less than half a dozen examples of errors and improper withholding of funds in each and every estimate" from the time of the contract summary for September 1964 to the time of shutdown one year later (Appellant Posthearing Brief, 440).³⁷⁰

³⁶⁸ *Whitbeck, Receiver v. United States*, 77 Ct. Cl. 309 (1933).

³⁶⁹ "7. PAYMENTS TO CONTRACTOR

"(a) The Government will pay the contract price as hereinafter provided.

"(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

"(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever

The Government's position is that the appellant unrealistically expected monthly estimates to be precise, which is said to be a contradiction in terms since "the word 'estimate' implies an approximation" (Government Posthearing Brief, 513). While conceding that its "handling of * * * progress payment was not perfect," the Government asserts that "it was well within reasonable standards for estimating procedures" (Government Post-

the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

"(d) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

"(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. sec. 203, 41 U.S.C. sec. 15), a release may also be required of the assignee."

³⁷⁰ See Exhibit Nos. 93, 99A, 105, 132, 154, 166, 173, 197, 204, and 206 which are various letters of the appellant dated from October 16, 1964, to September 18, 1965, in which adjustment in schedule item quantities was requested.

hearing Brief, 520). It acknowledges that some "minor errors were made" and some underpayment, but maintains that "the total economic consequence of the errors was minor and certainly within the accuracy of the data which was used as the basis thereof."

The estimates were made by experienced field personnel, such as Messrs. Robert Ibach (supervisor of job inspection) Lasko and Wilcox. According to Messrs. Lasko and Wilcox, the figures arrived at were based upon personal evaluation and the best information available.³⁷¹ Certain items such as concrete quantities were capable of precise computation since they were paid on a neatline basis and accurate information as to the placements made was available.

Those quantities which had to be estimated roughly concerned mainly lump-sum items, such as earthwork and clearing. After the estimates were drafted by Messrs. Ibach and Lasko, they were reviewed by Messrs. Wilcox and Moore. The draft was then presented to the appellant's project managers (Mr. Miller and later Mr. Doak) for discussion. Mr. Wilcox testified that he gave careful consideration to their comments regarding any items that were being estimated, particularly earthwork quantities, and agreed with the contractor wherever possible, but retained the last word (11 Tr. 1242-43).

³⁷¹ Examination of the Monthly Estimate book (Appellant Exhibit C-126) reveals that the estimates were in rounded numbers.

In its Posthearing Brief discussion of payment abuses, the appellant has mentioned certain instances of alleged underpayment and wrongful withholding of payment. The first of these related to Bid Item No. 1. The appellant contends that at the time of the September 1964 contract summary the Government had carried the figure from stream diversion and dewatering at an unchanged "50% completion" through thirteen previous months, although continuing progress had in fact taken place on this phase of the work (Posthearing Brief, 441).

The contracting officer rejected the contention on the authority of the second paragraph of 47d.,³⁷² the

³⁷² "d. Payment.—Payment for diversion and care of the stream during construction and removal of water from foundations will be made at the lump-sum price bid therefor in the schedule. Except as otherwise provided in Paragraph 51, the cost of furnishing all labor, equipment, and materials for constructing cofferdams, dikes, channels, flumes, and other diversion and protective works; removing or leveling such works, where required; diverting the stream; making required closures; maintaining the work free from water as required; grouting drains and sumps; disposing of materials in cofferdams; and all other work required by this paragraph shall be included in the lump-sum price bid in the schedule for diversion and care of stream during construction and removal of water from foundations.

"Prior to beginning any work on diversion and care of the stream and removal of water from foundations, the contractor shall submit a water control plan showing his proposed method for diversion and removal of water from foundations. The water control plan shall be in such form as to allocate the total lump-sum price, bid for the item in the schedule for diversion and care of the stream during construction and removal of water from foundations, to not more than 12 major divisions of the work to be performed under this item. Such major divisions of the work shall be outlined and shall be identified by titles. For each division of the work to be

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provision pertaining to payment for diversion and care of the stream during construction and removal of water from foundations (Exhibit No. 251, pars. 176-77). We regard the contracting officer's determination as correct.

Under Paragraph 47d. monthly estimates may not include payment for any division of the work as allocated until such work as described under that division has been completed. Thus, the appellant was required to finish each item in the approved diversion plan (Exhibit No. 6) before payment could be made for any portion of that item.

Appellant's bid price of \$60,000 for Bid Item 1 was made up of seven divisions (Appellant Exhibit C-98). The first called for payment of \$10,000 and the second (construction of wells and dewatering during excavation of the southwest portion of the dam foundation) was valued at \$20,000, or a total of \$30,000. This sum, which was 50 percent of appellant's bid price for Bid Item 1, was paid in August 1963, upon completion. The next category—dewatering of area during placement of impervious core below stream bed elevation on southwest

portion—which called for payment of \$5,000, was not finished until October 1964, after the issuance of the September 1964 contract summary. The contractor was therefore not entitled to be paid for that aspect of the work in September 1964 or any previous time. The test under 47d. was not continuing progress but actual completion.

Another instance of alleged improper Government conduct respecting payment involves borrow and embankment. In connection with Bid Item No. 11 (excavation in borrow areas and transportation to dam embankment) the Government committed several errors in computations. As of October 1964, the cumulative totals for this item involved a quantity of 226,623 cubic yards and earnings of \$49,857.06.

After the winter shutdown in November 1964, cross sections were taken and it was discovered that a duplication of payment for stripping and borrowing quantities had occurred previously in the course of preparing the August and September 1963 estimates, amounting to 21,312 cubic yards.³⁷³ As a consequence, that quantity and the compensation therefor, in the sum of \$4,688.64, were deducted on the voucher for January 1965 (Exhibit No. 250, p. 8).

A second error occurred in July 1965. Borrow quantities were based on the embankment quantities (Item 13). When the July estimate

performed under the item for diversion and care of the stream during construction and removal of water from foundations, the water control plan shall show the proportionate part of the total lump-sum price allocated thereto. The above allocation of the lump-sum price shall be subject to the approval of the contracting officer, and when approved, shall become a part of the contract. Monthly estimates for progress payments will include the amount allocated to each major division of work for the month during which such work has been completed."

³⁷³ The corrected cumulative quantity as of January 1965 was 205,311 cubic yards and the cumulative earnings were \$45,168.42.

for embankment was made on July 25, the additional work to be performed during the remaining six days of the month was overlooked. This resulted in a shortage of approximately 12,000 cubic yards of embankment which was in turn reflected in the estimate for borrow. The appellant was therefore underpaid by approximately \$2,640. The deficit was corrected on the August 1965 estimate (Exhibit No. 250, p. 8).

A third error involved an underpayment of approximately \$4,200 for 18,670 cubic yards of borrow in August 1965. The payment for borrow was determined from the amount of embankment placed, plus a shrinkage factor, for Zone 1 and Zone 2 material. The Government incorrectly assumed that the Zone 3 material had come from stockpiles, but later determined that it came from borrow (Exhibit No. 250, p. 8).

In connection with Bid Item 13 (Earthfill in dam embankment, Zone 1), payment was made in May 1965, for 2,645 cubic yards in order to compensate for an alleged underpayment in 1964. In June 1965, however, it was determined that there had actually been an overpayment for 3,364 cubic yards at the end of the 1964 season, rather than an underpayment. An adjustment was therefore made of approximately \$2,500 (Exhibit No. 250, p. 9).

An overpayment was also made in connection with Item 15 (Sand, gravel, and cobble fill in dam embankment, Zone 2) of approxi-

mately \$400. In August 1965, complete survey cross sections of the dam embankment were run. It was discovered that during the 1964-1965 winter shutdown, computations based on surveys of the embankment constructed showed an overpayment of 3,472 cubic yards. An adjustment was therefore made for the overpayment (Exhibit No. 250, p. 10).

Another adjustment was made for underpayment in connection with Item 17 (Miscellaneous fill in dam embankment, Zone 3). During the 1964-1965 winter shutdown computations based on surveys of the embankment constructed to date showed an underpayment for 2,775 cubic yards. When the complete survey cross sections of the dam embankment were run in August 1965 the discrepancy, amounting to approximately \$500, was discovered. (Exhibit No. 250, p. 12).

Decision

We hold that the manner in which the contractor was paid by the Government did not in and of itself justify appellant's stoppage of work on September 18, 1965. Under the terms of Paragraph 7, it is clear that progress payments were to be based upon "estimates approved by the contracting officer." Implicit in such a provision is the requirement that the estimates be made as carefully and accurately as possible from all the data then available under the circumstances then existing. Implicit, also, however, is the understanding that an estimate is

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but an approximation, is based upon incomplete data, is therefore subject to upward or downward revision, as the case may be, and in that sense will probably not be free of discrepancy when compared with the final computation.

The estimates here were made by experienced Government personnel. There were some underpayments, as there were some overpayments. The mere occurrence of underpayments and overpayments, which required later adjustment, does not establish bad faith or ineptitude on the part of the Government in carrying out its contractual obligations. The possibility of such differences should have been anticipated on a project of this magnitude.

Moreover, where, as here, parties are in serious disagreement over the validity of claims submitted by the contractor or as to the amounts owed for changes, extra work, etc., it is to be expected that progress payments will correspond to the amounts which the contracting officer determines are owed by the Government.

There is insufficient evidence in the record to support a finding that the amounts arrived at were unreasonable. The appellant has not met its burden by simply introducing into evidence the Government's Monthly Quantity Estimate Book (Appellant Exhibit C-126), the Government's Monthly Pay Estimate Books in two volumes (Appellant Exhibit C-127), and the Government's Final Book (Appellant Exhibit C-128). These unpagi-

nated books together encompass some seven inches in thickness. If there is sufficient basis in this documentation to support appellant's allegations it was incumbent upon the appellant to point to specific instances thereof. Particularly where a massive record is involved, and the parties are represented by able counsel, it is not the obligation of the Board to search "for errors that may be lurking among the labyrinths."³⁷⁴

Unlike *Whitbeck*, relied upon by the appellant, we hold that the terms of the payment provisions of the contract were complied with by the Government.³⁷⁵ For this reason, the other cases cited by the appellant in its Prehearing Brief (at 110-15) are also distinguishable.³⁷⁶

Claim for Adjustment in Contract Price Due To Increase In Sales Tax Rate

Another instance of alleged wrongful withholding of payment by the Government relates to appellant's claim for an adjustment in the

³⁷⁴ *Algonac Mfg. Co. v. United States*, 192 Ct. Cl. 649, 661 (1970). See, also, *Sundstrand Turbo v. United States*, 182 Ct. Cl. 31, 60 (1968); *Williamsburg Drapery Co. v. United States*, 177 Ct. Cl. 776, 781-82 (1966).

³⁷⁵ Compare *Pilcher, Livingston & Wallace, ASBCA No. 13391* (June 4, 1970), 70-1 BCA par. 8331, at 38,765.

³⁷⁶ *Suburban Contracting Co. v. United States*, 76 Ct. Cl. 533 (1932); *Brooklyn and Queens Screen Manufacturing Co. v. United States*, 97 Ct. Cl. 532 (1942); *Martin & Co. ASBCA No. 3117* (October 19, 1956), 56-2 BCA par. 1150, *U.S. Services Corp., ASBCA Nos. 8291 and 8433* (March 29, 1963), 1963 BCA par. 3703; *Q.V.S., Inc., ASBCA No. 3722* (November 17, 1958), 58-2 BCA par. 2007; *Valley Contractor, ASBCA No. 9397* (February 12, 1964), 1964 BCA par. 4071.

contract price due to an increase in the Utah sales tax. By letter dated September 10, 1964, the appellant claimed it was entitled to an adjustment in the contract price under Paragraph 23³⁷⁷ as a result of an increase in the sales tax rate from 3 percent to 3½ percent (Exhibit No. 46). According to the appellant, it had paid Utah sales taxes totaling \$10,562.54. It was seeking reimbursement in the amount of \$1,508.93, which represented one-seventh of the total amount paid as of that date. The contractor also advised that it would make further periodic applications to be compensated for the tax as subsequent purchases were made and the tax paid thereon.

The appellant was thereafter notified by letter dated October 8, 1964, that it was entitled to an ad-

³⁷⁷ "23. Taxes

"In accordance with Paragraph 9 of these specifications, it shall be the responsibility of the contractor to fully inform himself regarding all Federal, state, and local tax laws, rules or regulations which in any way, may relate to the materials and services to be furnished under this contract, including all exemption provisions and procedures.

"Within 60 days after date of award of contract, the contractor shall advise the contracting officer in writing of any Federal, state or local taxes which he has excluded from the prices bid in the schedule. Should the contractor fail to submit this information within the prescribed 60-day period or any extension thereof, no adjustment in the contract price under Paragraph 9 will be made except for an increase or decrease in the rate of any tax or for any new tax. The contractor shall also furnish such additional information as the contracting officer may require as to the item or items of material or services which he has considered to be exempt from taxation under the terms of this paragraph, and the cost thereof. The information submitted by the contractor will become a part of the contract."

justment in the contract price in accordance with Paragraph 9 of the General Conditions,³⁷⁸ if it warranted that no amount for the increase in the tax was included in the contract price as a contingency reserve or otherwise (Exhibit No. 89).

The appellant so warranted in its letter dated June 23, 1964, by which it advised that Utah sales taxes amounting to \$15,316.25 had been paid (Exhibit No. 181). It requested an adjustment of \$2,188.04 due to the increased rate. According to the contracting officer, \$1,100 of this amount was included in the June 1965 contract summary for payment (Exhibit No. 251, par. 237).

In Findings of Fact No. 2 (Exhibit No. 251, par. 238) the contracting officer also found that the appellant was entitled to further adjustments if appellant "made additional purchases since June 23, 1965, on which the increased rate of one-half percent sales tax was paid." He allowed the appellant the balance of \$1,088.04 requested in its letter of June 23. In the absence of

³⁷⁸ "9. Federal, State, and Local Taxes

* * * * *

"b. Except as may be otherwise provided in this contract, the contract price includes all Federal, State, and local taxes and duties in effect and applicable to this contract on the tax inclusive date, except taxes from which the Government, the contractor, or the transactions or property covered by this contract are then exempt. Unless specifically excluded, duties are included in the contract price.

"c. (1) If the contractor is required to pay or bear the burden (1) of any tax or duty, which either was not to be included in the contract price pursuant to the requirements of subparagraph b., or was specifically excluded from the contract price by a provision of this

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supporting evidence, the contracting officer held that he had no basis for allowing any additional amount.

Decision

We uphold the contracting officer's determination. The appellant

contract; or (ii) of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price; or of any interest or penalty thereon, the contract price shall be correspondingly increased: *Provided*, That the contractor warrants in writing that no amount for such tax, duty or rate increase was included in the contract price as a contingency reserve or otherwise; and *Provided further*, That liability for such tax, duty, rate increase, interest, or penalty was not incurred through the fault or negligence of the contractor or its failure to follow instructions of the contracting officer.

* * * * *

"(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this subparagraph c., shall set forth the amount thereof as a separate item and shall identify the particular tax involved.

"(4) Nothing in this subparagraph c., shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes, unemployment compensation taxes, or any State and local taxes; except those levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract, including gross income taxes, gross receipts taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipt from sales.

"(5) No adjustment of less than \$100 shall be made in the contract price pursuant to this subparagraph.

* * * * *

"e. (1) The contractor shall promptly notify the contracting officer of all matters pertaining to Federal, State, and local taxes and duties that reasonably may result in either an increase or decrease in the contract price.

"(2) Whenever an increase or decrease in the contract price may be required under this paragraph, the contractor shall take action as directed by the contracting officer, and the contract price shall be equitably adjusted to cover the costs of such action, including any interest, penalty, and reasonable attorney's fees."

has not substantiated its entitlement to any sum resulting from the increase in the Utah sales tax rate beyond the amount allowed by the contracting officer in Findings of Fact No. 2.

The Government has stipulated there have been no payments made to the contractor since the contractor left the job (45 Tr. 5100). Upon an apparent default by a contractor, the Government is entitled to withhold payments that may have accrued to the contractor prior to its default pending a determination of the propriety of the default termination.³⁷⁹

Adjustments for Overruns and Underruns

The appellant asserts that the Government is guilty of a:

* * * failure and refusal to make any adjustment whatsoever for overruns and underruns ranging from an underrun of 79% on Item 8 (tunnel supports) to an overrun of 102 percent on Item 9 (tunnel rock bolts), and underrun of 40% on Item 4 (dam embankment foundation excavation). (Appellant Posthearing Brief, 434)

In addition, the appellant claims that adjustments are required in connection with Bid Items 5 (Excavation for grout cap to 5 feet in depth), 6 (Excavation for grout cap between depths of 5 and 8 feet),

³⁷⁹ See *United States v. Dumas*, 149 U.S. 278 (1893); *Filtron Company, Inc.*, DCAB No. ESSA-5 (January 29, 1970), 70-1 BCA par. 8086.

and 10 (Furnishing and installing chain link woven fence) (Exhibit No. 93). The adjustments are sought pursuant to Paragraph 18 (Quantities and Unit Prices).

Paragraph 18 provides for an equitable adjustment to be made when the actual quantities of any of the schedule items marked in the bid schedule with an asterisk amount to more than 120 percent or less than 80 percent of the estimated quantities.³⁸⁰ Under Paragraph 18d., quantities over 120 percent are to be paid on the basis of the:

*** contractor's actual necessary costs of performing the excess units as deter-

³⁸⁰ "18. Quantities and Unit Prices

"a. The quantities stated in the schedule are estimated quantities for comparison of bids, and, except as hereinafter provided in this paragraph, no claim shall be made against the Government for excess or deficiency therein. Payment at the prices agreed upon will be in full for the completed work and will cover materials, supplies, transportation, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

"b. The following Subparagraphs c. through f. shall be applicable only to the unit-price pay items and the quantities noted in the bidding schedule with the symbol*.

"c. Where the actual quantity of an item is more than 120 percent or less than 80 percent of the estimated quantity in the bidding schedule, an equitable adjustment in the contract price shall be made on written demand of either party. Any claim of the contractor for an adjustment under this paragraph due to the actual quantity being less than 80 percent of the estimated quantity must be asserted in writing within 30 days after completion of the item. In case a contractor's claim for adjustment is based on the actual quantity being more than 120 percent of the estimated quantity, such claim must be asserted in writing within 30 days after the date the actual quantity exceeded 120 percent of the estimated quantity."

mined by the contracting officer, plus a reasonable allowance, not to exceed 15 percent of such actual necessary costs, for superintendence, general expense, and profit, all in accordance with Paragraph 7 (Extras).³⁸¹

With respect to underruns, Paragraph 18e. provides that payment:

*** will be computed by applying the unit price bid in the schedule to the actual quantity and then adding to the result an amount obtained by applying to the number of units of underrun below *** 80 percent of the estimated quantity, a reasonable allowance per unit for the contractor's mobilization and other fixed costs relating thereto.³⁸²

The contracting officer determined in Findings of Fact No. 2 that the following items (designated by asterisk in the bid schedule) qualified for adjustment in contract price under the provisions of Paragraph 18 (Exhibit No. 251, p. 69):

³⁸¹ "d. For overruns, the equitable adjustment shall be limited to the number of units by which the actual quantity exceeds 120 percent of the estimated quantity. In case the parties to the contract cannot agree upon such equitable adjustment, such adjustment may, at the option of the contracting officer, be based on the contractor's actual necessary costs of performing the excess units as determined by the contracting officer, plus a reasonable allowance, not to exceed 15 percent of such actual necessary costs, for superintendence, general expense, and profit, all in accordance with Paragraph 7 (Extras)."

³⁸² "e. When the actual quantity of an item is less than 80 percent of the estimated quantity, final payment for the item will be computed by applying the unit price bid in the schedule to the actual quantity, and then adding to the result an amount obtained by applying to the number of units of underrun below the 80 percent of the estimated quantity, a reasonable allowance per unit for the contractor's mobilization and other fixed costs relating thereto."

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Item	Description	Estimated quantity	Final quantity	Units subject to adjustment	
				Under 80 percent	Over 120 percent
8	Furnishing and placing permanent structural steel tunnel supports (lb)-----	38, 000	8, 100	22, 300	-----
9	Furnishing and installing tunnel rock bolts (lf)-----	1, 400	2, 868	-----	1, 188
10	Furnishing and installing chain link woven wire fabric (sf)-----	4, 000	1, 794	1, 406	-----
14	Specially compacted earthfill, Zone 1 (cy)-----	8, 000	4, 458	1, 942	-----
24	Drilling grout holes in stage between 110 and 160 feet (lf)-----	1, 000	1, 490	-----	290
27	Pressure grouting foundations (cf)-----	24, 000	36, 501	-----	7, 701
34	Furnishing and handling cement (bbl)---	14, 700	20, 514	-----	2, 874

The contracting officer found, however, that the appellant had not submitted the data called for by Paragraph 18 upon which to base adjustments for the overruns and underruns.³³³ The contractor evidently did not do so because of its position that the costs of individual items cannot be segregated. Consequently, the contracting officer undertook to ascertain the appellant's costs with respect to items with overruns of more than 120 percent based upon the Government's records.

In his judgment the Government's records were inadequate for this purpose. He concluded that it was not practicable to make a unilateral determination of the contractor's actual necessary costs of

performing the excess units such as may be done at the option of the contracting officer under Paragraph 18b. In the absence of such cost data from the contractor, he denied the claim for adjustment in the contract price of those items exceeding 120 percent of the estimated quantity (Exhibit No. 251, par. 187). He further held that a proper assessment could not be made concerning the contractor's mobilization and fixed costs included in the unit price bid, in connection with the items the final quantities of which were less than 80 percent of the estimated quantities, in the absence of appropriate data from the appellant (Exhibit No. 251, par. 188).

With respect to Item 4, the contracting officer found that the appellant completed 94.1 percent of the estimated final quantity which amounted to 56.9 percent of the schedule quantity (140,000 cubic yards), or 27,415 cubic yards below 80 percent of the schedule quantity. He denied the claim for relief under Paragraph 18 for lack of evidence

³³³ Exhibit No. 251, par. 186:

"The contractor has not submitted a monetary value considered by him to be an equitable adjustment for the actual quantities of any of the asterisked items which exceeded 120 percent of the schedule quantity, nor has he submitted his proposal of a reasonable allowance per unit for his mobilization and other fixed costs to be applied to the under-runs below 80 percent on any of the asterisked items."

of the contractor's mobilization and fixed costs (Exhibit No. 251, par. 190).

In addition he denied the claim for the underrun on the ground that it was encompassed in the work changed pursuant to Change Order No. 1 and was therefore covered by the equitable adjustment made therein (Exhibit No. 251, par. 193). The contracting officer took the position that Paragraph 18c. provided for an equitable adjustment to be made only with respect to work as bid in the schedule, but when work is changed and an equitable adjustment made therefor, the work is not subject to further adjustment as an overrun or underrun under Paragraph 18.³⁸⁴

The Board, however, does not take the view that the appellant is necessarily precluded from additional relief under Paragraph 18 by virtue of the earlier adjustment made by the contracting officer pursuant to the Changes clause. Paragraph 18 and the Changes clause were intended to provide two separate avenues of adjustment³⁸⁵ and the exercise of one does not automatically foreclose the exercise of the other unless the contractor

would be unjustly enriched or doubly compensated thereby.

The bid schedule estimated that Item No. 4 would consist of 140,000 cubic yards. It actually resulted in 85,253 cubic yards, or an underrun of almost 55,000 cubic yards.³⁸⁶ The Government suggests "that the fact that the contractor was not required to excavate more dirt at \$0.24 per cubic yard was sizably in his favor" (Government Posthearing Brief, 98-99).

Nevertheless, the Government "freely" conceded that the appellant is entitled to an adjustment under the provisions of Paragraph 18 because of the underrun in the quantity of Item 4 (Government Posthearing Brief, 99). Its position, however, is that having failed to furnish its mobilization and other fixed costs per unit as required by Paragraph 18, the appellant is not entitled to an allowance.³⁸⁷ In any event, we regard the Government's concession as a recognition that the appellant is not precluded by reason of Change Order No. 1 from

³⁸⁴ Exhibit No. 251, par. 191. With respect to Item 4, he pointed out that as a result of the mis-staking, appellant was paid for 20,964 cubic yards of excavation for dam embankment foundation under Change Order No. 1 (at the rate of \$2.11 per cubic yard), in the total amount of \$44,173.15. According to the contracting officer, payment included an allowance of 15 percent to cover the contractor's superintendence, general expense and profit, "which allowance included at least a large portion of the contractor's fixed costs." (Exhibit No. 251, par. 192)

³⁸⁵ See *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661 (1968).

³⁸⁶ According to Mr. Fred J. Davis, the underrun occurred for two reasons. First, there was a failure of the estimated two-foot average stripping to materialize; actual stripping ran approximately 30,000 cubic yards instead of the estimate of 49,000 cubic yards (51 Tr. 5668). Secondly, the cutoff trench was not staked as wide as the designers anticipated, particularly near the fringes of the valley floor (51 Tr. 5669).

³⁸⁷ The Government asserts that Appellant Exhibits C-190, C-191, and C-234 do not show any allowance for haul roads, preparation, mobilization or any other fixed cost in relation to any of the earthwork items, including Item 4. The Government takes the position that the appellant did not include in any particular item in its bid any amounts for mobilization or other fixed costs, since the bid was "not prepared in that fashion" (Government Posthearing Brief, 99-100).

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additional relief under Paragraph 18.

The contracting officer also found that Items 5 and 6 qualified separately for treatment under Paragraph 18, inasmuch as the estimated quantities thereof were 470 cubic yards and 190 cubic yards, respectively, and the final quantities were 683.4 cubic yards and 312 cubic yards, respectively. He determined, however, that the work on Items 5 and 6 was performed as a single operation and, as a consequence, the costs applicable to each item were inseparable from the total cost. He found that the contractor's bid prices indicate that its mobilization and other fixed costs for Item 6 were included in Item 5. Accordingly, he combined the quantities for Items 5 and 6 and then analyzed the overall figures for adjustment. As the combined items show a total overrun of 8.3 percent, the contracting officer concluded that Items 5 and 6 were not subject to adjustment under Paragraph 18.

It does not appear to us that the contracting officer was authorized to combine the quantities of Items 5 and 6 for purposes of applying Paragraph 18. Paragraph 18 does not provide for such joint adjustment. Accordingly, we hold that he erred in lumping them together. Items 5 and 6 meet the test prescribed by Paragraph 18 and should not have been excluded from consideration by him.

The contracting officer, however, acted properly in all other respects in denying the adjustment for lack

of evidence. It was incumbent upon the appellant to provide the contracting officer with the data called for by Paragraph 18. The data available to the contracting officer was insufficient to make the adjustments.

Such data has also not been furnished to the Board by the appellant. The Government, therefore, contends that the "Board is in no better position to make adjustments than the contracting officer" (Government Posthearing Brief, 522).

The Board does not take so narrow a view. Where overruns have occurred we are not bound to follow only the provisions of Paragraphs 18c, d., and e. These subparagraphs are intended to provide a means of reaching an accommodation at the contracting officer's level. It is clear from Paragraph 18f. that in the event an adjustment cannot be arrived at pursuant to Paragraphs 18c., d., and e., the dispute is to be determined in the same fashion as any other dispute arising under the contract.³⁸⁸ Accordingly, we hold that the appellant is entitled to consideration in this appeal for all of the overruns and underruns specified *supra* as set forth in our discussion of the equitable adjustment *infra*.

Under the circumstances, however, we are unable to find that the

³⁸⁸ "f. If the parties fail to agree upon the adjustment to be made, including any adjustment made at the option of the contracting officer as provided in Subparagraph d. of this paragraph, the dispute shall be determined as provided in Clause No. 6 of the General Provisions." Clause No. 6 of the General Provisions is the Disputes Clause.

Government's course of conduct here provided any justification to the appellant for ceasing work.

Riprap

Another alleged instance of payment "abuse" of which appellant complains relates to riprap. The appellant contends that it "never received payment for over 700 tons of riprap" (Appellant Posthearing Brief, 443). In August 1963, the appellant received oral permission from the Government to use large rock obtained from open-cut excavation for riprap (Exhibit No. 251, par. 226). Thereafter, by letter dated April 14, 1964, the appellant submitted the proposal in writing (Exhibit No. 18). On May 20, 1964, the Government rejected the plan on the ground that the rock was of questionable quality and could not be used for riprap and bedding material.

At the contractor's request the matter was reconsidered. The Government advised that if permission was granted to use the rock as riprap and bedding material, an equal amount of Zones 2 and 3 material should be deducted from quantities paid for under the bid schedule. On June 17, 1964, the appellant agreed and proposed that the quantity used should be deducted from Item 15 (sand, gravel and cobble fill in dam embankment, Zone 2) (Exhibit No. 25). Thereafter, on July 7, 1964, the Government advised that a deduction from Item 11 (Excavation in borrow areas and transportation to dam embankment) was more appro-

priate than from Item 15 (Exhibit No 30).

On September 28, 1964, the appellant withdrew its agreement that an equal amount of Zones 2 and 3 material should be deducted from quantities paid for under the schedule (Exhibit No. 73). The appellant's position was based upon Paragraph 51 of the specifications.³⁵⁹ The contractor recognized that under Paragraph 51d. its unit price for open-cut excavation included an allowance for transportation of materials from excavation to points of final use, disposal areas, and temporary stockpiles, and from temporary stockpiles to points of final use, but contended that the last paragraph of subparagraph d. provides that all excavated materials placed in completed earthwork and embankment construction will also be included for payment under the appropriate items of the schedule. The appellant maintained that properly it cannot be deprived of payment for the quantity placed in the embankment and the price paid for the riprap should not be reduced by a like amount.

The Government's position was that the contractor performed open-cut excavation and received payment therefor under Item 3 of the schedule in the amount of \$1.72 per cubic yard. Permission was granted to the contractor to use the larger material as riprap in the stilling basins and around the intake structure. For excavating, hauling and placing riprap under Item 18 of the

³⁵⁹ Note 253 *supra*.

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schedule the contractor was paid a unit price of \$2.21 a ton. Since the contractor received payment for excavating the material in its stockpiles, the Government maintained it is not entitled to receive, in addition to the payment under Item 3, the full unit price under Item 18. The Government contended that appellant's bid price of \$2.21 per ton for Item 18 was not applicable, since the contractor had already recovered its excavation cost, and a new unit price would therefore have to be negotiated.

The contractor then agreed on October 30, 1964, that an adjustment was proper (Exhibit No. 95). The Government advised the appellant on April 12, 1965, that a price of \$3.40 per cubic yard for hauling the riprap from stockpile and placing would be equitable (Exhibit No. 151). The appellant agreed to this proposal on April 15, 1965, provided the use of the stockpiled rock was limited to areas downstream from the axis of the dam (Exhibit No. 155). On May 10, 1965, the Government indicated its acceptance (Exhibit No. 164).

Thereafter the quantity of riprap placed by the contractor was computed on a cubic yard basis. Item 18 provides for riprap to be paid for on a tonnage basis. In order, therefore, to provide interim compensation to the appellant for the riprap, the Government made payment under Item 18 for the number of tons at \$2.21 per ton that was equivalent to the actual cubic yards placed at \$3.40 per cubic yard. In the June

1965 contract summary, payment was made for 3,846 tons at \$2.21 per ton or a total amount of \$8,499.66. Riprap in the total amount of 2,962.7 cubic yards was selected from the stockpiled material, hauled and placed at the tunnel inlet structure and the two outlet structures.

In Findings of Fact No. 2 the contracting officer concluded that in accordance with the agreement with the appellant, payment was due the contractor in the amount of \$10,073.18, which consists of 2,962.7 cubic yards at \$3.40 per cubic yard, less the amount of \$8,499.66 which had previously been paid under Item 18 (Exhibit No. 251, par. 233). He held that the total net adjustment due the appellant was \$1,573.52.

It appears from the foregoing that the elements of an accord and satisfaction are present with respect to this claim.³⁹⁰ Appellant's contention that it never received payment for "over 700 tons" of riprap refers in all likelihood to the allowance by the contracting officer in paragraph 233 of Findings of Fact 2.³⁹¹

Denial of Administrative Relief

The appellant contends that the Government "breached the contract by its complete failure to follow the change order procedure and to act

³⁹⁰ See *Framlau Corporation*, ASBCA No. 13892 (February 17, 1970), 70-1 BCA par. 8145, aff'd on reconsideration (April 29, 1970), 70-1 BCA par. 8273; *Boston Pneumatics, Inc.*, GSBCE No. 2121 (November 16, 1966), 66-2 BCA par. 5976.

³⁹¹ If \$1,573.52 is divided by \$2.21 (appellant's unit price per ton of riprap), the resultant figure is 712 tons.

promptly and in good faith on changes and claims" (Appellant Prehearing Brief, 115). It allegedly "was compelled to perform changed work at enormous cost for over a year with no Change Orders and no pay even for changes later acknowledged" (Appellant Posthearing Brief, 445). The Government's position is that "the timing of decisions and administrative actions on claims was clearly dictated by express requests from the contractor that were honored in total by the Contracting Officer" (Government Posthearing Brief, 530). In addition, the Government contends that the claims sequence "shows how little the contractor behaved like an aggrieved individual who had suffered through all of the indignities now alleged" (Government Posthearing Brief, 475).

In examining the timing of claims presentation, we note that between July 17, 1963 and April 1964, most of the work for which the appellant is seeking to be compensated was performed. Thus, the cutoff trench was excavated; Borrow Area No. 2 was opened up and considerable material hauled therefrom and placed in Zones 2 and 3 of the embankment; the tunnel was excavated and partially lined; the inlet and outlet portals of the tunnel were excavated, as was part of the stilling basin for the outlet works; a portion of the spillway excavation was completed; and the roadway was excavated to approximate Station 200. During this period appellant sent a telegram

(Exhibit No. 9), dated October 4, 1963, giving notice of claim for extra work under Bid Item 4 (Excavation for Dam Embankment Foundation) and filed a notice of claim, dated November 8, 1963, pertaining to the cutoff trench (Exhibit No. 10). The notice of claim closed with a statement that the appellant was not then able to determine the equitable adjustment to which it was entitled and would submit a detailed claim for adjustment "as soon as the extent of said extra expenses can be ascertained."

On April 22, 1964, the appellant met with the contracting officer in Denver.³⁹² At this conference, the contracting officer invited the appellant to "open [its] brief case" and tell him about its claims, but was told that it was "premature to do so at that time" (Exhibit No. 92). Thereafter, the parties conferred at the job site on April 23, and 24, 1964.³⁹³ When asked to discuss its claims, the appellant would not list or discuss them "on the advice of counsel," but said it would do so shortly (Appellant Exhibit C-246, p. 460).

By letter dated May 23, 1964 (Exhibit No. 22), the appellant advised that a claim would be filed with respect to the top of the shaft. This was the first indication that the appellant was making any claims in connection with the tunnel. Tunnel excavation had commenced in August 1963, and was completed in Oc-

³⁹² 43 Tr. 4811-13; 45 Tr. 5127; Exhibit Nos. 83 and 92.

³⁹³ Appellant Exhibits C-159 and C-246, pp. 459-61, 464-66.

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tober 1963. Concreting of the tunnel was finished in June 1964 (Government Exhibit B-535).

Between August and November 1964, the appellant raised for the first time most of the disputes which are presently under consideration. Counting only exhibits in the appeal file, approximately 70 items of correspondence were exchanged by the parties during this period. On August 25, 1964 came its first notice of claim with respect to open cut excavation (Exhibit No. 38). At this time appellant had largely finished excavation for all of the structures, had completed the concrete for the intake structure and had started on the concrete for the outlet works stilling basin. Its contentions were thereafter set out in a letter dated September 21, 1964 (Exhibit No. 65).

By letter dated September 3, 1964, the appellant advised that claim would be made for an extension of time as a result, *inter alia*, of what it characterized, without more, as extra roadway work, extra work in tunnel and shaft, extra work in open cut excavation at both upstream and downstream entrances and spillway, and extra drilling and grouting in grout cap (Exhibit No. 41). Then, on September 8, 1964 (Exhibit No. 42) the appellant protested the cost implications of the revised drawings pertaining to the access shaft transmitted by Government letters dated February 20, 1964 (Exhibit No. 17) and July 2, 1964 (Exhibit No. 29).

On September 10, 1964 (Exhibit No. 48), the appellant proposed that it be compensated in the amount of \$26,935 for construction in the upper reaches of the access shaft to the outlet works. On September 16, 1964 (Exhibit No. 58), at a time when the excavation had been completed for almost a year, and substantially all of the tunnel and gate shaft had been concreted, it requested that payment of extra excavation and concrete in connection with the tunnel and gate shaft work be on an "as built" basis.³⁹⁴

In a letter dated October 16, 1964 (Exhibit No. 92, p. 3), the appellant acknowledged that it "must prove our claims" but advised, speaking of its claims generally, that "instant proof is not obtainable" and that "in many, if not most instances, determination of increased costs and extra time requirements must abide the completion of the work." The contractor specifically requested that the Government "not peremptorily deny both the existence of the change and the fact of increased costs simply because [its] preliminary applications are as yet incomplete."³⁹⁵

³⁹⁴ The Government responded on September 16, 1964, that it could not pay on an as built basis, but had to follow Paragraph 51d. of the specifications (Exhibit No. 60). The letter to the contractor concluded:

"If you feel that you have been directed to perform work outside specification requirements on which no agreement has been reached or no payment made, you should itemize your costs for each such instance in accordance with paragraph 8 of the General Conditions, so the contracting officer can make a formal decision regarding your protests."

³⁹⁵ By this time the cutoff trench had been almost completely backfilled. No cost data, however, were forthcoming.

A few days previously, however, on October 12, 1964 (Exhibit No. 91), the appellant complained as follows concerning the Bureau's "handling of contractor claims":

*** [W]e are finding an almost total refusal on the part of the Contracting Officer's authorized representative to acknowledge the existence of the contractor's claims ***. Instead we have been treated *** with patronizing recital of notice provisions in the general provisions and general conditions.

*** We are told that if we will furnish full particulars, including dates, nature of conditions, verbal orders and detailed breakdown of increased costs, then our claim will be investigated and the Bureau will then be able to prepare a "Finding of Fact" for consideration by the [contracting officer.]"

The appellant then stated:

Unfortunately, perhaps, we have been almost totally dependent to date upon the records of the Bureau ***. [I]t seems entirely inappropriate to us for the Bureau to tell us that action will be taken upon our claims if we will furnish the Bureau with detailed records. In almost all cases, *** the Bureau has ample records to measure and evaluate the claims where measurement of quantities is involved. ***

With the exception of appellant's claim, dated December 18, 1964, in connection with the pipe line break (Exhibit No. 112), there was little other correspondence between November 1964 and February 1965 (during which period the appellant was for the most part shut down). Starting, however, with appellant's letter dated February 12, 1965 (Exhibit No. 132), and ending with its letter dated March 18, 1965 (Exhibit No. 147), the appellant contended that it was entitled to prompt

time and money adjustments for its claims, while concluding that details on the claims "will be submitted in the near future under separate cover."³⁹⁶ Its letter of March 18, 1965, which dealt in part with a meeting held on March 17, 1965, of contractor and Government representatives,³⁹⁷ contained a "damage summary" reflecting its "total cost damages" of \$2,159,048.57, without any itemization except by broad categorization and percentage allocation.³⁹⁸

On April 9, 1965, the contracting officer telegraphed the appellant as follows (Exhibit No. 150):

*** As you have been previously advised on several occasions, decisions on these claims have been withheld pending submission by you of details and supporting data. Particular reference is made to my letter of 10-6-64, requesting your prompt submission of protests and supporting data on any claims you wished to make. No such data have ever been furnished except on one item. Your letters of 2-12-65, 3-2-65, and 3-18-65 indicated your desire for prompt decisions by me on these various claims. In absence of supporting data from you, evaluation of claims is proceeding on basis of Government records only.

³⁹⁶ Exhibit No. 132, p. 7. See also, Exhibits Nos. 135, 138 and 140.
³⁹⁷ Following the meeting, Messrs. Borden, Davis and L. R. Thygesen were designated by the Government to investigate the appellant's complaints. The report of their investigation is in Appellant Exhibit C-8.
³⁹⁸ *** As near as we can now allocate, the percentages of increased cost attributable to the individual claim items run approximately as follows:

	Percent
(1) Core trench.....	48-50
(2) Open cut.....	20-25
(3) Roadway	10-15
(4) Tunnel and Shaft.....	5-10
(5) Miscellaneous	5"

(Exhibit No. 147, pp. 5-6.)

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He then stated that he had intended to issue decisions on the cut-off trench and other claims in final form, in order to enable appellant to appeal, but that instead he would issue interim decisions in order to allow the appellant to submit further data, if the appellant desired.

In a letter to the contracting officer, dated April 13, 1965 (Exhibit No. 154, p. 4), the appellant protested his "proposed decision procedure involving a protracted and staggered procedure calculated to produce fragmented and detached piecemeal decisions on selected features of an integrated claim composed of related claim items."³⁹⁹ The contractor went on to state that it did "not wish to be understood as requesting a hasty and ill-considered decision, based on inadequate data." (p. 5) and suggested (p. 6) that the contracting officer "make only an interim decision."

Attached to the letter is an appendix of correspondence by the contractor to the Bureau by dates arranged according to claims. Under the heading "cut-off trench" five dates are listed. Under the heading "Gate Chamber, access shaft and shaft house," eleven dates are listed. Under the heading "Open cut excavation" eight dates are listed. Under "Pipeline break" six dates are listed. Sixteen dates are listed under the "Roadway" heading. Seven dates are listed under the

"Rip Rap" heading. Under the heading "Sales tax" four dates are listed. Under "Tunnel and shaft" eleven dates are listed. Under "Contract summary" five dates are listed.

Within this itemization the appellant has indicated those of its letters in which a "dollar amount [was] submitted." There are three in all: (1) under "Gate Chamber, access shaft and shaft house," a letter of September 10, 1964; (2) under "Pipeline break" a letter of December 18, 1964; and (3) under "Sales tax," the letter of September 10, 1964.

As we have seen *supra* the contracting officer issued Orders for Changes No. 1, 2 and 3 on April 20, May 10 and May 21, 1965, respectively, in interim form. He advised, by telegram, dated May 18, 1965, that he had reviewed the various claim items which had not been considered in the change orders and had reached the tentative conclusion that they lacked merit. The appellant was requested to indicate if it desired final determinations on those items at that time or if it wished to submit additional data for consideration prior to issuance of the decisions.

By telegram dated May 21, 1965 (Exhibit No. 168), the contractor requested a "prompt conference for presentations of detailed supporting claims data and exchange of other information relating to claims before contracting officer's final decision." The contracting officer granted appellant's request for additional time for such claims presentation to

³⁹⁹ On the previous page, the contractor said, "On-going work and continuing Bureau action giving rise to new claims and increase of old ones has made piecemeal, interim claims-submittal impractical."

June 25, 1965.⁴⁰⁰ By telegram dated May 25, 1965 (Exhibit No. 171), the contractor advised that "further data and information will be submitted." The telegram concluded:

Since contractor recognizes that your final decision should not be based on inadequate and erroneous information secured from Bureau records alone, contractor hereby reaffirms that prior to any final decision contractor wishes to make further record presentation and factual documentation for all items of claim * * *.

Between June 7 and June 11, 1965, a number of meetings of contractor and Government representatives took place.⁴⁰¹ Examination of a summary of the discussions indicates that the topics taken up involved, to a large extent, Government records (Appellant Exhibit C-119).

By letter dated June 21, 1965 (Exhibit No. 178), the appellant submitted "a computation of the minimum extra costs incurred in the core trench work."⁴⁰² A meeting

was held on June 22, 1965, at which, according to the appellant, it was agreed that the contracting officer would "hold further action on all pending claim items and orders for change in abeyance pending receipt of further claim substantiation from the contractor."⁴⁰³ It was also agreed that "before issuing final decisions * * * the contractor [would be afforded] an opportunity to discuss and negotiate settlement of claim items * * * susceptible of settlement."

In addition, the appellant stated in Exhibit No. 179 that it was:

* * * now reviewing our claims material to determine the time it will require for us to prepare the supplementary claims material which you have requested. We will advise you in the near future of the approximate time within which we believe this can be accomplished.

In its letter dated July 2, 1965 (Exhibit No. 186), which was in response to Exhibit No. 182, the appellant stated, at p. 2:

We are now proceeding with preparation of additional claims material supporting both admitted and contested liability items. Evidence and analysis supporting contested liability items may be presented under separate item headings. However, the cost data, for reasons previously indicated, will not be artificially segregated into separate work items and areas within work items. Since the vari-

is possible to compute some of the minimum increased costs incurred by the contractor in particular parts of the work without including increased costs on other work directly involved in the same changes and changed conditions."

⁴⁰³ Exhibit No. 179. The contracting officer's letter dated June 24, 1965 (Exhibit No. 182) is a summary of the meeting which agrees essentially with appellant's summary (Exhibit No. 179).

⁴⁰⁰ Exhibit No. 170. He pointed out that the "only reasons for the issuance of orders for Changes No. 1 and 2 on the basis of Government records only in tentative form were your failure to submit data for evaluation, repeated demands for early decisions, and your request that interim procedures be followed."

⁴⁰¹ A previous meeting occurred on May 5, 1965, at which the appellant complained that it had received no payment from the Government since October 1964. It was explained that payment for January 1965 had not been made because the appellant had not submitted a signed voucher or completed labor certification (Appellant Exhibit C-121).

⁴⁰² The appellant prefaced its computation with the following statement:

"The only accurate and complete measure of the damages Steenberg * * * has suffered * * * is the difference between the fair and reasonable cost of doing the total work under the job conditions represented * * * and the fair and reasonable cost of doing the total work with the changes and changed conditions involved in the actual work. However, it

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ous claim items constitute a unitary claim, the cost consequence of the conditions and changes giving rise to the claim must be unitized by comparison between the reasonable cost of the total work as bid and the reasonable cost of performing the total work as modified.

The appellant concluded its letter by acknowledging that at the June 22 conference "there was a * * * sincere indication of willingness on both sides to proceed as rapidly as possible, to achieve prompt and amicable settlement of pending disputes and to avoid future ones. * * *"

Thereafter, by letter dated July 20, 1965 (Exhibit No. 189), the appellant submitted equipment rental rate data together with excerpts from equipment rental and ownership manuals. On August 11, 1965 (Exhibit No. 197), it acknowledged receipt and protested the alleged inadequacy "of the July estimate check in the amount of \$51,639.75." The appellant here also characterized "the cumulative deficiency in quantities [as] so substantial that it constitutes a willful breach of the payment obligations of the contract." None of the cost data previously referred to were included.

Next, the appellant sent a letter dated August 12, 1965 (Exhibit No. 198), in connection with borrow area operations. No cost data were supplied.

On August 30, 1965, the Government sent appellant Change Order No. 4 (Exhibit No. 201), dated April 30, 1965, which appellant contends was deliberately delayed, as

mentioned *supra*. On September 3, 1965 (Exhibit No. 202A), the appellant was forwarded the contract summary for August 1965. By letter dated September 13, 1965 (Exhibit No. 203), the appellant questioned the adequacy of Change Order No. 4 and stated it was being included as a part of its overall pending claim.

On September 17, 1965, the appellant protested the August Summary (Exhibit No. 204). In a second letter of that date the appellant questioned the dam embankment staking (Exhibit No. 205). This letter closed with the statement that the contractor did not propose to remove any material from any portion of the dam embankment until it received certain survey data from the Government. The next day appellant sent its letter (Exhibit No. 206) advising that work was being discontinued.

Decision Respecting Denial of Administrative Relief

The record before us does not support a finding that the Government did not afford appellant timely consideration of its claims. On the contrary, we hold that the Government acted promptly under the circumstances.⁴⁰⁴ It was the appellant who first delayed in presenting its claims and then delayed in submitting its proof. Commencing with the filing

⁴⁰⁴ In *Franklin W. Peters and Associates*, note 103, *supra*, this Board held that a claim of dilatory payment by the contracting officer to the contractor is one for breach of contract over which the Board has no jurisdiction.

of the cutoff trench claim in November 1963, until shortly before the appellant stopped work, the appellant's rather consistent position was that details of its claims would be furnished later. Such details were not forthcoming.

Moreover, whenever, the contracting officer indicated that final determinations would be issued, the appellant requested forbearance until further data could be submitted. It is unreasonable to attribute the ensuing delay to the Government. The appellant itself was responsible.

Overall there is more to criticize in the appellant's field organization, construction planning and techniques, and approach to presentation of claims than there is in the handling of the awarded contract by the Bureau of Reclamation. Although the Government's contract administration was not exceptional, in our judgment it was above average.⁴⁰⁵

Decision Respecting Propriety of the Termination For Default in General

We have taken up *supra* certain acts of alleged Government misconduct which the appellant has in-

voked in justification for its abandonment of the work. We have found no pattern of gross underpayments by the contracting officer. We have found there was no unreasonable delay on the part of the Government in processing and deciding appellant's numerous claims. We have held that none of these considered singly excuse the contractor. Judged collectively, as appellant has urged us to do, the whole does not have an impact which is substantially greater than the sum of its fragmented parts. The *Leary Construction Co.* case, *supra*, is clearly distinguishable on the facts.

A contractor may not abandon work because he disagrees with the contracting officer's decision. As was said in *Max M. Stoeckert v. United States*, 183 Ct. Cl. 152, 162-63 (1968):

[S]uch an election is simply not open to a Government contractor under the standard disputes clause found in this contract which specifically requires that: * * * Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision.

The appellant has asserted, and the Board does not doubt, that it experienced financial difficulties in the course of performing the work. We find, however, that the appellant has failed to establish that its economic problems are attributable in any substantial degree to acts or omissions of the Government following award of the contract. A contractor's financial distress is not an ex-

⁴⁰⁵ In our view the Government was somewhat dilatory in processing Change Order No. 4, but the small amount of work and money therein involved should not have done any great harm to the appellant's financial position particularly since the appellant did not furnish the Government with the pertinent cost data (36 Tr. 4104-05; 74 Tr. 8186). It is noted that the Court of Claims has held that a contractor is not excused from complying with the terms of its contract by reason of the Government's poor contract administration, *Panoramic Studios, Inc. v. United States*, 188 Ct. Cl. 1092 (1969).

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cuse for nonperformance under the Default clause.⁴⁰⁶

Accordingly, the termination for default is upheld.

EQUITABLE ADJUSTMENT

The appellant has, in the main, sought to recover on the basis of its total expenditures less contract receipts.⁴⁰⁷ This method, under which an equitable adjustment is measured by the difference between a contractor's original bid estimate and the total cost of performing the contract as changed, is known as the total cost approach. The approach is not favored and has been applied only under exceptional circumstances where the record showed that there was no other alternative.⁴⁰⁸

The method is held in disfavor because it is based on three questionable premises: (1) that the actual cost incurred is the proper cost for the work; (2) that the estimate is a fair approximation of what it would have cost to actually perform the work had no change occurred; and (3) that the change was the sole cause of the increased cost. Thus, as this Board has pointed out, such items as equipment breakdown,

contractor inefficiency, bad weather, and acts of third parties might cause increases in cost which would not be the responsibility of the Government.⁴⁰⁹

The appellant's position is that "cardinal breaches affecting the total contract work" committed by the Government "and errors and omissions of the Government" prevented the appellant "from obtaining any adequate and reliable measure of damages save by a comparison of estimated costs with actual costs * * *" (Appellant Prehearing Brief, 89). It has sought to fit this case within the framework of those decisions in which the total cost approach was utilized.⁴¹⁰ It is said that the "combined holdings" of these cases "indicate that total cost measurement of damages or equitable adjustment should only be applied where no other adequate alternative exists, where there is proof of reasonableness of the Contractor's planned costs and where there is proof not only that the Contractor's actual costs are reasonable, but also that there are proper safeguards by way of giving consideration to any evidence that the Contractor itself was responsible for any increased costs."

However, at the apparent in-

⁴⁰⁶ *Consolidated Airborne Systems, Inc. v. United States*, 172 Ct. Cl. 588 (1965).

⁴⁰⁷ Appellant Posthearing Reply Brief, 72-4; Appellant Prehearing Brief, 86, 89. At 73 of its Posthearing Reply Brief, appellant asserts, based upon its revised Exhibit C-216, that its total costs less the amount paid by the Bureau was \$2,640,947. This sum was arrived at by subtracting \$1,459,812, the total paid by the Bureau, from total job costs of \$4,100,759.

⁴⁰⁸ *James A. Boyajian v. United States*, 191 Ct. Cl. 233 (1970); *Phillips Construction Co. v. United States*, 184 Ct. Cl. 249, 260 (1968); *Rubin, The Total Cost Method of Computing an Equitable Adjustment-An Analysis*, 26 Fed. B.J. 303, 304 (1966).

⁴⁰⁹ *Montgomery-Macri Co. & West. Line Const. Co., Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3819.

⁴¹⁰ Appellant Posthearing Brief, 480-81, citing *Great Lakes Dredge & Dock Co. v. United States*, 119 Ct. Cl. 504 (1951), cert. denied, 342 U.S. 953 (1952); *Oliver-Finnie Co. v. United States*, 150 Ct. Cl. 189 (1960); *J. D. Hedin Construction Co.*, note 7, *supra*; and *H. John Homan Co., Inc. v. United States*, 189 Ct. Cl. 500 (1969).

stance of the hearing official,⁴¹¹ the appellant has presented an alternative approach to the total cost method based upon a "Summary of Allocated Claims."⁴¹² It consists of a tabulation for the following items: earthwork (apportioned); core trench; roadway; open cut; tunnel; concrete (except tunnel). There is no further breakdown within the individual claim headings of specific costs attributable to particular allegations.⁴¹³

However, the various exhibits from which the overall schedule of allocated claims (Appellant Exhibit C-225) is derived are based upon pertinent bid items. Thus, revised Appellant Exhibit C-217, entitled "Excess Payroll Costs Earthwork Items," covers Bid Items 1, 3, 4, 5, 11, 13, 14, 15, 17 and 64. Revised Appellant Exhibit C-218, relating to M & S Construction Company earthwork excess payroll costs, includes Bid Items 1, 4, 11 through 17, 64 through 69, and 71 through 76. Revised Appellant Exhibit C-

219 is entitled "Claim for Excess Grouting Cost Core Trench Related Items" and covers Bid Items 20 through 27 and 33, less Items 28 and 29. Revised Exhibit C-220 relates to appellant's claim for excess costs in the tunnel (excluding overhead) and covers Bid Items 7, 40, 41, 43 and 35 through 37.⁴¹⁴

Revised Appellant Exhibit C-221 is entitled "Claim for Excess Concrete Costs Except Tunnel Items" (excluding overhead) and covers Items 38, 39, 44, 45, 79, 35 through 37, and 41. Appellant Exhibit C-223 relates to equipment owned by the appellant and rented by it from the partnership known as Steenberg Construction Co., pursuant to an agreement dated November 22, 1963 (Appellant Exhibit C-231). Appellant Exhibit C-224 is a schedule of equipment used by M & S on the project.⁴¹⁵

The Government challenges the appellant's alleged equipment costs as set forth on revised Exhibit C-216, which shows rental charges for the use of Steenberg partnership equipment in the amount of \$573,628, and charges for the use of appellant's equipment totaling

⁴¹¹ Early in the hearing the hearing official said (5 Tr. 489-90):

"* * * [I]t will be necessary to itemize the claims under separate headings and numbering, perhaps, even where one claim involves several sub-items, so that they can be dealt with separately. Such as 1-A, 1-B, and so on." In requesting such a breakdown, he said "that we don't wish to get into the realm of total costs * * *." (5 Tr. 492.) At the conclusion of the hearing the hearing official repeated this request (83 Tr. 9481-82).

⁴¹² Appellant Exhibit C-225 (revised); Appellant Posthearing Reply Brief, 73. Appellant Exhibit C-225 is derived from Appellant Exhibits (revised) C-217, C-218, C-219, C-220, C-221, C-223, and C-224.

⁴¹³ At 73 of Appellant's Posthearing Reply Brief, the total of allocated claims is given as \$2,516,560, which is composed of core trench, \$1,541,739; roadway, \$72,740; tunnel, \$297,408; open cut, \$288,028; and concrete (except tunnel), \$316,645.

⁴¹⁴ Attached thereto are Appellant Exhibits C-220-A, entitled "Actual Cost of Tunnel Mining and Cleanup," relating to bid items 7.09, 7.84, 7.87 through 7.89, 7.91 through 7.94, and 7.96; C-220-B (revised), entitled "Excess Steel Cost," and covering items 35, 36, and 37; C-220-C, entitled "Actual Cost of Tunnel Concrete—Placement Only;" and C-220-D, entitled "Actual Cost of Gate Chamber and Shaft Concrete Equipment and Materials—Placement Only." Exhibit C-220-B purports to show the projected subcontract costs, but the figures shown represent amounts the appellant included in its bid.

⁴¹⁵ Although not referred to on Revised Appellant Exhibit C-225, Appellant Exhibit C-229 is entitled "Excess M & S Costs."

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\$454,506. According to the Government, the contractor's bid includes only approximately \$300,000 of base equipment ownership cost (Government Posthearing Brief, 639-40).

The Government asserts that the equipment rental rates are unreasonable. It attacks the lease arrangement (Appellant Exhibit C-231) on the ground that it was not an arm's-length agreement, since the principal stockholders of the appellant were major partners of the lessor.

Article VII(a) of the partnership agreement (Appellant Exhibit C-283) provides that the net profits or losses of the partnership are to be shared in the following ratio: Richard R. Steenberg, 36.3 percent; Emil E. Walsh, 27.3 percent; Paul Steenberg, Jr., 18.2 percent; and John E. Matthews, 18.2 percent. Examination of Appellant Exhibit C-283, which sets forth in not entirely legible form the stockholdings in the appellant corporation, reveals that out of a total of 4,995 shares, Richard R. Steenberg owned 912½; Elsie Steenberg, 910; Emil Walsh, 675; Wenonah Walsh, 672½; Paul Steenberg, Jr., 457½; Marjorie Steenberg, 455; John E. Matthews, 887½; and Leona Matthews, 25.

The equipment rental agreement, which was entered into by Messrs. Walsh and Paul Steenberg, Jr., on behalf of the appellant, and Mr. Matthews on behalf of the lessor, itemized the various pieces of equipment rented and provided for the

following monthly rental starting December 1, 1963:

92% of current A.E.D. monthly rental rates, upon demand by lessor but not less than 30 equal monthly rental payments of \$7,241.00 each commencing on December 10, 1963, and payable on the 10th day of each month thereafter for a total of 30 consecutive months.⁴¹⁶

The lease, also provided that it "shall be non-cancellable."

At the hearing the Government sought to introduce evidence purporting to establish the unreasonableness of the appellant's equipment rental rates.⁴¹⁷ The evidence was based upon a comparison between amounts paid for equipment purchased and amounts realized on resale. The hearing official, however, ruled that:

* * * the cost to the partnership of the equipment which was leased to the corporation and the resale value or resale proceeds of that equipment to the partnership are immaterial and that the best evidence [of equipment cost] is the rental rates charged by the partnership to the corporation. (82 Tr. 9357)

He held that the Government "has the burden of showing by some competent evidence that those rates were unreasonable." As a result of these rulings, the appellant main-

⁴¹⁶ Mr. Steenberg testified that the monthly rental represented the amount of minimum monthly payment required to be made by the partnership to the First National Bank of St. Paul, which was financing the acquisition of the equipment (49 Tr. 5466-67; 69 Tr. 7645-47).

⁴¹⁷ Those portions of Government Exhibits B-612, B-613, B-614, B-617, B-620, and B-621, which relate to partnership equipment and Government Exhibit B-611 in its entirety were ruled inadmissible but the Government was permitted to make an offer of proof in connection therewith (83 Tr. 9404-06, 9413).

tains that the only meaningful evidence before the Board on the question of costs is its own (Appellant Posthearing Reply Brief, 72, 81).

We are of the view that the restriction on the admissibility of the Government evidence relating to the partnership equipment costs should not have been imposed. In its interlocutory order of November 1, 1968, which we regard as the law of the case⁴¹⁸ on this question, the Board said, at 2 thereof, with respect to appellant's equipment costs:

At a minimum the claimed costs are subject to testing and evaluation by all available competent evidence.⁴¹⁹

Although we do not hold, as the Government has urged (at 683 of its Posthearing Brief) that the equipment rental agreement was a "sham," we regard the partnership and appellant corporation as being under common control. As such the provisions of the lease entered into between them do not constitute irrebuttable evidence of the appellant's rental costs.⁴²⁰ On the contrary, the

arrangement must be subjected to close scrutiny and analysis. Accordingly, we have reviewed the Government offer of proof and we hold that Government Exhibits B-611, B-612, B-613, B-614, B-617, B-620 and B-621, are competent and they are admitted.

The appellant asserts that its records provide a proper basis for evaluating costs of labor and materials. With this approach the Government, albeit with some exceptions, does not disagree (Government Posthearing Brief, 640). With respect to equipment expenses, however, the appellant maintains that its records are incomplete and so in calculating equipment cost it relied on the applicability of Paragraph 21 of the specifications.⁴²¹

The appellant's position is that Paragraph 21, providing for the use of modified formulae appearing in the Associated General Contractors' publication "Contractors' Equipment Ownership Expense" (Gov-

⁴¹⁸ See *United States v. Swift & Company*, 189 F. Supp. 885, 902 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961); *J. C. Millett Co. v. Distillers Distributing Corporation*, 185 F. Supp. 874, 877-78 (N.D. Cal. 1960), *aff'd*, 310 F.2d 162 (9th Cir. 1962).

⁴¹⁹ The Board also stated in its interlocutory order at 3 thereof, "that a record should be made which will allow a wide range of Board review relating to the quantum issue in this appeal." The subsequent offer of proof made at the hearing (82 Tr. 9345, 9361; 83 Tr. 9413, 9415), was of such wide latitude, in accordance with the November 1, 1968, order, that further proceedings are not required. See 5 Moore, *Federal Practice* par. 43.11, at 1383 (2d ed. 1971).

⁴²⁰ See *Sanders Associates, Inc.*, ASBCA No. 8481 (February 25, 1964), 1964 BCA par. 4091, at 19,985; *Brown Engineering Co., Inc.*, NASA No. 31 (March 13, 1964), 1964 BCA par. 4101.

⁴²¹ "21. *Equipment Allowances for Contract Adjustments*

"a. General.—If the contractor is ordered to perform extra work in accordance with Paragraph 7 [Extras] of the specifications, the allowance made for the equipment used on the extra work shall, except for shift rates, be determined from the schedule of average ownership expense listed in "Contractors' Equipment Ownership Expense" as published by the Associated General Contractors of America and in effect on the date of the contract. * * *

"f. Changes.—In determining the equitable adjustment to be allowed for changes ordered by the contracting officer pursuant to Clause No. 3 [Changes] or [Changed Conditions] of the General Provision, the allowance for equipment used in the performance of work under the order for changes may at the option of the contracting officer be determined in accordance with the provisions of this paragraph."

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ernment Exhibit B-624), governs all equipment cost alleged. The AGC manual is intended to cover the average costs of owning and maintaining construction equipment by means of the average annual expense percentage of capital investment without field repairs. Since appellant did not maintain equipment expense records, it has estimated its operating expense on the basis of an assumed percentage of the ownership costs.

Mr. Steenberg used 35 percent of the equipment rate as a factor for inclusion of such costs as repair, parts, fuel and oil. A factor of 5 percent was used to cover freight. To each item of equipment for the time it was on the job, appellant applied equipment rates which were approximately 20 percent less than those under modified AGC rates and under the "Compilation of Averaged Rental Rates for Construction Equipment" published by the Associated Equipment Distributors of the United States.⁴²²

According to the appellant, it "did not keep a segregated cost record on all of the costs incurred with respect to equipment used by" it on the Lost Creek project because this was not the practice of the corporation (Appellant Posthearing Reply Brief, 82). The reason given "was

that interest on borrowing money, taxes, and other items were kept as separate overhead items and never carried to any job." Consequently equipment operating expenses were estimated pursuant to Paragraph 21.

The Government maintains that the application of rates developed under Paragraph 21 will greatly overcompensate the contractor for the use of its equipment on the Lost Creek project. With respect to claims governed by the Changes and Changed Conditions Clauses, which is the situation here, its position is that reliance on Paragraph 21 is optional with the contracting officer. The contracting officer so found in Findings of Fact No. 1 (Exhibit No. 221, par. 8), although, in the absence of actual cost data, he there utilized the AGC rates. In the interlocutory order dated November 1, 1968, the Board, at 2 thereof, expressly held that "the provisions of Clause 21 of the contract relating to the use of AGC formulae for measuring equipment rental rates are not considered mandatory or exclusive at least as to Clause 3 or Clause 4 claims." This determination constitutes the law of the case.

The Government also contends that the appellant's actual cost of owning and operating the equipment used by it at Lost Creek Dam can be derived from the contractor's books and records. The Government undertook such a computation, through an allocation or distribution of costs to bid items on a reasonable basis, in accordance with

⁴²² The AED publication, identified as Government Exhibit B-622, bears a notation by the hearing official that it was ruled inadmissible and an offer of proof was made in connection therewith. However, at 83 Tr. 9420-21, it is clear that Exhibit B-622 was received in evidence. The Hearing Official's notation was therefore inadvertent. Utilization of the AED rates appears in the appellant's letter dated June 21, 1965 (Exhibit No. 178).

the number of hours that labor usually associated with equipment operation worked (81 Tr. 9190). Among the end-products of this exercise are the Government exhibits referred to *supra*. It asserts that the contractor should have kept accurate records and that, consequently, "there is no excuse whatsoever for estimating operating expense."⁴²³ Moreover, the Government maintains that the operating expenses are cost of doing business items chargeable to overhead or indirect expense which the contractor could have determined from its records but made no effort to do.⁴²⁴

The issues, then, that confront us in determining the equitable adjustment to which the appellant is entitled are these: (1) Does this case meet the factual requirements of those decisions wherein utilization of the total cost approach was approved? (2) Should allowable equipment cost be based on the provisions of Paragraph 21? (3) Finally, what amount should the allowance be?

The conditions which must be present before the total cost method will be applied are set forth in the *J. D. Hedin Construction Co.* case

(note 7, *supra* at 86-87) on which the appellant relies:

The exact amount of additional work which plaintiff had to perform * * * is difficult, if not impossible, to determine because of the nature of the corrective work which was being performed. * * * There is no precise formula by which these additional costs can be computed and segregated from those costs which plaintiff would have incurred if there had been no government-caused difficulties. * * * [T]he reasonableness and accuracy of plaintiff's estimate, which was prepared by an experienced engineer whose qualifications have been unchallenged, have been established. * * * The closeness of the bids gives support to the reasonableness of the estimate. * * * Plaintiff on prior occasions has successfully constructed a number of large projects for the Veterans Administration. * * * [T]he responsibility of defendant for these damages is clear. The only possible method by which these damages can be computed is by resort to the "total cost" method. * * *

The Board has examined these criteria in the light of the record before us. Our conclusion is that application of the total cost approach is not warranted.

First, we are not persuaded that the various alleged wrongs of the Government are so intertwined that it is a fruitless task to attempt to isolate them into individual claims. The mere fact that the appellant's books and records do not, in segregated form, show the amounts of the increased costs does not give it automatic license to use the total cost method (*Boyajian*, note 408, *supra*, at 252). Moreover, the appellant has broken down its overall claim into various allocated claims, albeit somewhat late in the day. Al-

⁴²³ Government Posthearing Brief, 641. The Government admitted therein that such a distribution is by no means perfect and criticizes the contractor for having failed to note each dollar of repair expense and gallon of gasoline required for each piece of equipment.

⁴²⁴ Government Posthearing Brief, 642. The appellant has acknowledged that "interest on borrowing money, taxes and other items were kept as separate overhead items and never carried to any job" (Appellant Posthearing Reply Brief, 82).

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though it did not go far enough, the end result shows that the additional costs can be categorized. The total cost approach is "tolerated only when no other mode" of determining costs is available.⁴²⁵

The reasonableness of the appellant's bid has not been established. Examination of the abstract of bids does not support a conclusion that it was reasonable (Government Exhibit B-629). The Government engineers' estimate for the work was \$2,794,732. The appellant's bid was \$2,053,000. The second lowest bidder's bid was \$2,856,105. The appellant's bid was thus over \$853,000 below the second bid and only 74 percent of the Government's estimate.⁴²⁶

A comparison of the appellant's bid with the engineers' estimate and the average of the ten other bids received reveals serious underbidding by the appellant on individual items (Exhibit No. 220, p. 1). Thus, with respect to Bid Item 4 (excavation for dam embankment foundation), appellant's bid per cubic yard was \$0.24, the Government estimate was \$1.40, and the average of the ten other bids was \$1.41. For Bid Item 11 (excavation in borrow areas), the appellant bid \$0.22 per cubic yard, the Government estimate was \$0.40, and the average of

the other bids was \$0.53. As for Bid Item 64 (excavation for roadway), the Government estimate was \$0.80 per cubic yard and the average of the other bids was \$0.81, but the appellant's bid was only \$0.15.

Finally, as the Board has indicated *supra* we are by no means satisfied that the responsibility of the Government for the costs as alleged is clear. Equipment breakdown, for example, can cause increases in cost which should not be attributed to the Government. In the Daily Construction Reports and the diaries of contractor and Government personnel there are numerous instances of equipment breakdown mentioned.⁴²⁷ As previously noted there are clear indications in the record that appellant's losses were at least in part the result of unduly low unit prices.⁴²⁸ In its proof of damages appellant relies upon evidence of a nature previously found insufficient by the Court of Claims.⁴²⁹

No presumption of reasonableness with respect to appellant's

⁴²⁵ *Boyajian*, note 408, *supra*, at 253; *Turnbull, Inc. v. United States*, 180 Ct. Cl. 1010 (1967).

⁴²⁶ Government Exhibit B-629; Exhibit No. 220, p. 1. In its letter dated April 17, 1964 (Government Exhibit B-408, appellant stated that it was "reluctantly obliged to accept award of the contract" under threat of forfeiture of its bid bond. The record does not substantiate this allegation.

⁴²⁷ Government Exhibit B-303, pp. 137-140, 142, 147, 149-154, 160-165, 181-183, 189-190, 192-194, 212, 216, 223, 233, 239, 244, 249, 251, 259, 263, 267, 270, 272, 276, 289, 303-307, 332, 336, 339, 363; Appellant Exhibit C-104, pp. 6, 7, 23, 35, 40, 41, 44, 47, 50, 54, 55, 59, 63, 64, 73, 90, 92, 112, 117, 120-123, 126, 127, 130, 131, 137, 138, 141, 150, 152, 153, 161, 171, 174-177, 182, 188, 199, 203, 224, 236, 246, 252, 267-269, 272, 274, 287, 294, 298, 357, 373, 378, 405, 409; C-242, p. 254; C-243, pp. 17, 50, 68, 71, 78; C-244, p. 10; C-245, pp. 24, 29, 70, 101, 108, 109, 120, 130, 136, 137, 140, 144, 156, 179, 180, 195, 199, 205, 220, 229, 252; C-246, pp. 269, 270, 280, 284, 290-294, 298, 302, 304, 309, 314, 322, 329, 340, 353, 358, 359, 373, 410, 420, 421, 424, 426, 427, 471, 475, 511, 538, 559, 564, 566, 568, 570, 616, 640, 668, 719, 728, and 737.

⁴²⁸ See *Boyajian*, note 408, *supra*, at 244.

⁴²⁹ See *Boyajian*, note 408, *supra*, at 246-47, and cases cited therein.

costs is applicable. The appellant's reliance on *Bruce Construction Corp. v. United States*, 163 Ct. Cl. 97 (1963), in which it was held that a contractor's expenditures made in the performance of a contract would be presumed to be reasonable is misplaced. As explained in *Boyajian*, the issue in *Bruce* did not involve the application of the total cost method and the doctrine therein stated is limited to the peculiar circumstances of that case.⁴³⁰

We now turn to the question of the applicability of the AGC equipment ownership rates developed under the provisions of Paragraph 21, and of the AED rates.⁴³¹ The Court of Claims has set forth the principles concerning the applicability of AGC or AED rates in *L. L. Hall Construction Company v. United States*, 177 Ct. Cl. 870 (1966) and in *George Bennett v. United States*, 178 Ct. Cl. 61 (1967),

⁴³⁰ The Court in *Boyajian*, at 252-54, also pointed out that *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968); *Turnbull*, note 425, *supra*; *Phillips Construction Co.*, note 408, *supra*; *Urban Plumbing & Heating Co. v. United States*, 187 Ct. Cl. 15 (1969), *cert. denied*, 398 U.S. 958 (1970); and *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180 (1965), all decided subsequently to *Bruce*, rejected the total cost approach and approved the rule stated in *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501 (1955), that an appellant's costs may not always be assumed to be reasonable (which holding had allegedly been superseded by *Bruce*).

⁴³¹ At the outset we note that Exhibit C-223 does not make clear which equipment was figured on an AGC basis and which on an AED basis. From Mr. Steenberg's testimony it seems that most had been calculated on an AED basis, discounted by about 20 percent and that the remaining equipment had been figured on an AGC basis, as modified by Paragraph 21 and similarly discounted (49 Tr. 5432-40, 5473-76).

relied on by the appellant.⁴³² In *Hall* the court noted that in previous cases it had used AED rates in determining equitable adjustments for contractor-owned construction equipment, but stated that it had done so only because (i) either the Government had not objected or proposed an acceptable alternative; or (ii) no evidence of any other method had been made available to it. The Court then proceeded to establish the following guidelines: (1) if evidence showing the actual cost incurred by the contractor in owning the equipment was available, it was to be used; (2) in the absence of evidence showing the contractor's actual ownership costs incurred, the AGC rates were to be used; (3) if the AGC rates were used, acquisition costs of each piece of equipment involved were to be applied to the formula contained in the AGC manual; and (4) if the AGC rates were used and the equipment had been idle, the dollar amount resulting from an application of the AGC formula was to be reduced by fifty percent since there would have been no wear and tear on the equipment under such circumstances.⁴³³

Under Paragraph 21 a value obtained by averaging the original cost of the equipment with the current replacement cost may be used as the capital investment base for

⁴³² See, also, Solimine, *Price Adjustments for Contractor-Owned Construction Equipment*, 11 AFJAG L. Rev. 315, 6 YPA 197 (1969).

⁴³³ In *Bennett* the Court of Claims reaffirmed the holding in *Hall* that AGC rates will be used only in the absence of evidence of actual cost figures.

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application of the percentages called for in the AGC schedule. The Government's position is that utilization of the average of original cost and current replacement cost tends to overvalue used equipment. It has been held that when a contractor's actual out-of-pocket equipment ownership costs are reflected in his records, these must be used and resort to an average of replacement and original costs can be had only where such evidence is lacking.⁴³⁴

The Government maintains that Exhibit C-190 provides an appropriate basis for the calculation of actual equipment costs so that resort to Paragraph 21 and AGC or AED rates is unnecessary. This exhibit consists of, *inter alia*, an equipment list in tabular form, made up by the appellant at the time of bidding (42 Tr. 4726). With respect to each piece of equipment listed, the acquisition costs, estimated resale price, job cost (difference between the purchase and resale price), freight (but not in all cases), and setup and operation cost (but not in all cases) are given.

However, in an apparent effort to meet the requirements for use of AGC rates set forth in *L. L. Hall Construction Co. v. United States*, *supra*, Mr. Steenberg testified that the appellant's regular books of account did not contain a ledger in which all costs of using equipment at Lost Creek were accumulated (69

Tr. 7634). The appellant did not segregate equipment costs by job (69 Tr. 7630). Also, in its Exhibits C-216 through C-221, C-223 through C-225, and C-229 (which are characterized by appellant as its "total cost records"), it did not include such items bearing upon the cost of operating equipment as transportation costs from job site to point of storage (after removal from the job) and from point of storage to point of sale, payroll, and cost of repair parts to place the equipment in required condition for resale.⁴³⁵

Mr. Steenberg also testified that equipment storage costs were not included, nor were personal property taxes and general liability and property damage insurance premiums paid on the equipment (69 Tr. 7632). In addition, current interest rates on invested capital, general overhead costs, charge for loss of use between last work and resale, compensation for risk on investment, and executive time and travel expense devoted to equipment purchase and sale were not included (69 Tr. 7632-34).

We are of the opinion, however, that transportation expenses, repair costs (including parts), and equipment storage costs after the appellant left the job are not the responsibility of the Government. These items may be reflected in the the equipment.⁴³⁶ At best they are

⁴³⁵ 69 Tr. 7631-32; Appellant Posthearing Reply Brief, 33-35.

⁴³⁶ Thus, a scraper, for example, needing repair probably will bring a lower price than a scraper in good repair. The cost of transportation of a piece of equipment might also have been reflected in the sale price.

⁴³⁴ *Nolan Bros., Incorporated*, ENG. BCA No. 2680 (January 23, 1967), 67-1 BCA par. 6095.

matters of overhead, recoverable as amounts the appellant received for a general and administrative expense and not as a direct equipment expense.⁴³⁷ With respect to taxes and insurance, they are noted on the appellant's books and are allocable by conventional cost and accounting methods to bid items. Executive time and travel are regarded as overhead.

Despite Mr. Steenberg's testimony, therefore, it appears to us that the appellant's actual costs of owning and operating the equipment can be computed with some degree of accuracy from its books and records. The Government undertook to do so. The result of its computations may have shortcomings in some particulars, but they do serve as a generally realistic standard of comparison by which the reasonableness of the costs claimed by the appellant may be judged. When a contractor takes the position that its books and records are completely adequate for all purposes but equipment expenses and resort to AGC and AED rates may lead to overvaluation of the equipment, elementary fairness requires careful scrutiny of the figures in question.

In our view there is considerable merit to the Government's contention that for used equipment the substitution of the average of original cost and current replacement cost for value may result in over-

valuation.⁴³⁸ We note, for example, that in appellant's letter of July 20, 1965 (Exhibit No. 189), respecting equipment rental rates, the 1965 cost ascribed to a 1951 Euclid end dump was \$34,275, and the original new cost was given as \$32,500, giving an average cost of \$33,387.50. According to the Government, however, this piece of equipment is carried on the appellant's depreciation schedule at an original actual cost of \$19,600.⁴³⁹ Using the average cost figure, the hourly rate for the Euclid end dump is \$9.11, but when the Government's figure is applied to the AGC monthly factor, the hourly rate is only \$5.35.⁴⁴⁰

We are met by additional difficulties when we further examine the content of the AGC rates. Under the AGC manual, the annual equipment expense is composed of these items: (1) depreciation; (2) major repairs and overhauling; (3) interest on the investment; (4) storage, incidentals and equipment over-

⁴³⁸ In this connection we note that in the AGC pamphlet, each contractor is told to use the value of his own particular piece of equipment (Government Exhibit B-624, p. 1).

⁴³⁹ Government Brief in Support of Request for Production of Records and Motion for Ruling on Admissibility of Evidence, dated October 29, 1968, 14 (incorporated by reference into Government Posthearing Brief, 678).

⁴⁴⁰ The figures are based upon 176 hours per month. Euclid end dumps are carried at a monthly rate of \$1,600 (Appellant Exhibit C-223, p. 3). Application of the formula contained in Paragraph 21 changes the number of days and hours per month from 22 and 176, respectively, to 26 and 208. That decreases the hourly rate from \$9.11 to \$7.70 and from \$5.35 to \$4.52, respectively. According to the AGC manual, 22 days per month, or 176 hours, are considered working days (Government Exhibit B-624, p. 3). The \$1,600 monthly rate is arrived at by applying the 4.8 percent per working month factor provided for in Exhibit B-624, p. 38.

⁴³⁷ Inasmuch as the appellant used Government land for storage of its equipment throughout the job, that portion of overhead included for storage is not allowable, since the appellant sustained no cost therefor.

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head; (5) insurance and (6) taxes (Government Exhibit B-624, p. 2). Only depreciation, major repairs, and overhauling are variables. Interest is carried at a uniform five percent, storage, incidentals and equipment overhead at 3.5 percent, and insurance and taxes at a uniform 1 and 1.5 percent, respectively.

The appellant, however, reduced its equipment ownership claim under Paragraph 21 by an arbitrary figure, which Mr. Steenberg stated was about 20 percent (49 Tr. 5433). In the absence of any identification of what specific factors were reduced and in what amounts, the reduction was presumably taken off the top as an overall discount.

With respect to depreciation, it is calculated on a straight line basis under the AGC schedule, with no allowance made for resale (Government Exhibit B-624, p. 2). Inasmuch as resales did occur here, it would seem that they should be regarded as credits to actual job cost depreciation, and application of the AGC rates would overstate the appellant's expense.⁴⁴¹

Similarly, the AGC rates make allowances for major repairs and overhauling but in appellant's job cost ledger there is shown an item called "Equipment Maintenance and Operation" in the amount of approximately \$276,000 (Government Exhibit B-600, Class 5). The application of the AGC rate here

would duplicate the appellant's actual expense included in the job cost ledger.

Application of the AGC rates would also result in duplication in connection with the items for taxes, insurance, interest, incidentals, and equipment overhead. Appellant has claimed a total of 26½ percent for field overhead, office overhead and profit and Mr. Steenberg testified that the appellant's general overhead accounts include amounts for interest, insurance and taxes.⁴⁴²

Another objection to the use of the AGC formula is that it calls for contractors to vary the factor for the number of months the equipment is used in accordance with their own experience. On the AGC schedule most of the major items of construction equipment are estimated at eight months average use per year. The appellant, however, has not actually supplied such evidence based upon its experience.

For these reasons we conclude that application of the AGC rates, as modified by Paragraph 21, to appellant's equipment costs is inappropriate.⁴⁴³ We are unable to

⁴⁴² 69 Tr. 7630. In this connection, we note that on Exhibits C-190, C-191, and C-234, allowances for these items (except for "use taxes" on C-190, p. 1) have not been included. Appellant Exhibit C-234 represents a final spreading into the bid schedule unit prices of the costs prepared by appellant on Exhibit C-191 (50 Tr. 5574-75).

⁴⁴³ With respect to AED rates, the foreword to Government Exhibit B-622 contains the following admonition:

"Sound business judgment dictates that the distribution [sic] should determine the rental rate for a particular piece of equipment by using the following steps:

1. Capitalize the equipment.
2. Determine the depreciation rate, mainte-

⁴⁴¹ It would also seem that Exhibit C-190 in which appellant set forth the purchase and estimated resale prices, at the time of bidding, constitutes a recognition of the propriety of actual depreciation (See 81 Tr. 9197).

find that all of the criteria required to be present before the AGC rates can be utilized have been met. The appellant has not affirmatively shown that its books and records are so incomplete or deficient that resort must be had to Paragraph 21.⁴⁴⁴ We therefore hold that appellant's books and records provide a more suitable basis for establishing its equipment costs than the AGC rates.

This is not to say, however, that we regard appellant's presentation of its alleged costs from its books and records as adequate for our purposes. We now turn to that evidence, looking first to the equipment rental agreement between appellant and the partnership (Appellant Exhibit C-231):

As we held *supra* the arrangement must be closely scrutinized to determine if it was made at arm's-length, in view of the control exercised by officials of the appellant over the partnership.⁴⁴⁵ We note, first, that the duration of the agree-

ment was established as thirty months, while at that time the scheduled expiration date of appellant's contract with the Government was approximately 22 months from the date of the lease. We note, also, that under the terms of the agreement the rental established was a minimum of \$217,230 to a maximum of over \$1,000,000.

Finally, we note that the agreement contains a non-cancelable clause, which appears unnecessary in view of the relationship between the parties. The record may not establish that the appellant could have rented similar equipment from another source at a lower cost (83 Tr. 9428), but the presence of a non-cancelable clause was not calculated to encourage subsequent shopping over the next thirty months.

Under all of these circumstances we hold that the rental agreement (Appellant Exhibit C-231) is entitled to little weight on the issue of establishing a value on the equipment used.

Next we examine appellant's remaining cost documentation, which consists of its revised Exhibits C-

nance costs, taxes, insurance, interest charges, and other costs.

3. Allocate the above over the expected useful life of the equipment.

4. Add your profit."

Mr. Steenberg testified that this provision was not observed by appellant (49 Tr. 5434). Accordingly, we hold the AED rates inapplicable.

⁴⁴⁴ See *L. L. Hall Construction Co. v. United States*, *supra*, in which the Court at footnote 4 thereof, quoted with approval from Trial Commissioner Gamer's report that where a contractor's books were adequate, they constituted the best evidence and could not be disavowed by the contractor for the purpose of its claim.

⁴⁴⁵ The Government asserts that "the partnership was not normally in the business of renting equipment to anybody" (Government Posthearing Brief, 682). It maintains that the appellant is claiming more equipment expense here than was collected by itself and

the partnership combined for the previous ten years.

Examination of Exhibit C-283 (p. 2) indicates that the appellant received the total of \$277,150.54 for equipment rental for the period June 30, 1953, through 1963. From September 30, 1953 through 1964, the partnership received \$481,593.92 for equipment rental. The average annual amount of equipment rental by the appellant for this period is shown as \$25,195.50. The average annual amount of partnership equipment rental for the period shown is \$43,781.27. The Board recognizes, however, that such a comparison, standing alone, is at best of slight significance. It is clear from Mr. Steenberg's testimony that the partnership was in the equipment rental business (69 Tr. 7640).

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216 through C-225 and C-229 (which is a summary of M & S costs in excess of payments to M & S). Exhibit C-216, composed of figures from the appellant's books and records, represents appellant's alleged total project costs, amounting to \$2,354,650. The Government has stipulated that this figure for total costs as of June 30, 1967, is correct.⁴⁴⁶

To this amount, the appellant has made certain additions for partnership equipment (\$573,628), corporation equipment (\$454,506) and costs of M & S in excess of payments (\$176,669), and 15 percent for overhead and profit. Appellant has also made certain deductions totaling \$218,297, and certain additions (\$224,722) based upon Travelers Insurance Company records. From the overall total of \$4,100,759, the appellant has deducted payments of \$1,459,812⁴⁴⁷ leaving a sum of \$2,640,947.

It does not appear, however, that Exhibit C-216 is wholly reconcilable with Appellant Exhibit C-225, which is a summary of appellant's excess cost exhibits (Exhibits C-217 through C-224). One reason therefor is that there are certain bid items of cost incurred on the job as to which the appellant is making no claim, but which are included in the

costs from its books of account. These have not been deducted and reconciled with appellant's excess cost approach. In addition, there are discrepancies present in the various excess cost exhibits.⁴⁴⁸

An especially serious divergence in approach between revised Exhibits C-216 and C-225 relates to overhead and profit.⁴⁴⁹ Included on C-225 is an allowance for overhead and profit of 261½ percent of the total excess costs. On C-216 the allowance sought is 15 percent of total project costs as adjusted. On C-225 the appellant has included a 10 percent factor for "direct job" or field overhead and 15 percent for "general overhead and profit," which amount to \$527,185. Mr. Steenberg testified that in his opinion both the 10 and 15 percent factors were reasonable (48 Tr. 5406).

⁴⁴⁸ *I. g.*, Appellant Exhibit C-219 (excess grouting cost) does not properly reflect the \$22,500 judgment which Prepak obtained (Appellant Exhibit C-65) and the fact that the unit prices in the successor subcontract with Continental were the same that the appellant had bid.

⁴⁴⁹ By adding the appropriate amounts (\$270,000 and \$337,000, respectively) shown, it appears from Appellant Exhibit C-234 (p. 18) that the appellant had approximately \$607,000 in its original bid for overhead and profit. Since the bid price was \$2,053,000.07 and the Government's estimate of contract earnings through August 1965, was \$1,570,860.14 (including contract adjustments), by dollar volume the appellant completed about ¾ of the work when it discontinued performance. On this basis its overhead and profit would be about \$400,000. The Government takes the position that the appellant shows overhead and profit amounting to \$543,093 in the original bid prices based upon appellant's understatement on Exhibits C-217 through C-221 and C-225 of planned costs of \$810,124 less the Government's determination of earnings for the same items of \$1,353,217 (Government Posthearing Brief, 717).

⁴⁴⁶ 80 Tr. 9063. This amount appears in Column 1 of Government Exhibit B-600 as \$2,354,650.24.

⁴⁴⁷ The Government estimated the appellant's earnings through August 31, 1965 as \$1,570,860.14, less retention of \$111,047.61 (Appellant Exhibit C-127B, Contract Summary (Construction) and Voucher, dated September 2, 1965. The difference is \$1,459,812.53.

It appears, however, that calculation of the appellant's field overhead cost is possible through the use of the appellant's labor distribution sheets: The Government made such an effort and its conclusions are shown under the heading "Misc. Overhead" on Government Exhibit B-621. Under the circumstances there does not appear to be any justification for the application of a straight percentage as the appellant has done.⁴⁵⁰ The expert opinion testimony relating to the 10 percent factor is not conclusive and need not be accepted.⁴⁵¹

With respect to the 15 percent allowance for general overhead and profit, the expert opinion testimony is also not conclusive. Mr. Steenberg testified as to certain items of expense that were carried in the appellant's general accounts (69 Tr. 7631-35), but no details were furnished as to the amount of these items. Such evidence is insufficient.⁴⁵²

The Board concludes from the foregoing review that the appellant's cost presentation does not provide an appropriate basis for the determination of the equitable adjustment to which we have found appellant to be entitled with respect to certain of the claims. This is not

that "extreme case" where the total cost approach represents the only feasible method of computing the amount due.⁴⁵³ The reliability of the supporting evidence has not been fully substantiated.⁴⁵⁴

The appellant has also failed to identify costs with specific actions. We, however, are concerned with particular costs of particular acts.⁴⁵⁵ Appellant, acting as a prudent contractor and aware of its claims, should have kept records specifically segregated and identified with each individual claim, whether there existed a formal change order or not.⁴⁵⁶

A contractor claiming an equitable adjustment has the burden of proof on quantum, as well as on entitlement.⁴⁵⁷ Were the record blank with respect to any alternative evidence, we would be obliged to deny such an adjustment "for failure of damage proof, regardless of the merits." ⁴⁵⁸

⁴⁵³ *Phillips Construction Co. v. United States*, note 408, *supra*, at 261 (1968).

⁴⁵⁴ *WRB Corporation v. United States*, 183 Ct. Cl. 409, 426 (1968).

⁴⁵⁵ In this connection, the following statement by the Court in *WRB*, *supra*, is appropriate:

"* * * A large measure of our present uncertainty is due to the plaintiff's complete failure to maintain accurate cost records during performance. The only excuse for this lack of diligence was that plaintiff did not expect to become embroiled in litigation over the * * * project. That is feeble justification for taking refuge in the total cost approach." In the instant case the appellant has maintained records but failed to extract and identify the necessary information therefrom.

⁴⁵⁶ *H. R. Henderson & Co. and A & H, Inc.*, ASBCA No. 5146 (September 28, 1961), 61-2 BCA par. 3166, at 16,446.

⁴⁵⁷ *Pilcher, Livingston & Wallace, Inc.*, ASBCA No. 13391 (September 25, 1970), 70-2 BCA par. 8488, at 39,455.

⁴⁵⁸ *Boyajian*, note 408, *supra*, at 254.

⁴⁵⁰ See *Warren Painting Company, Inc.*, ASBCA No. 13087 (July 22, 1971), 71-2 BCA par. 8993, at 41,791.

⁴⁵¹ *Allison & Haney, Inc.*, note 251, *supra*, 76 I.D., at 150-51, 69-2 BCA at 36,262 and cases cited in n. 32 therein.

⁴⁵² See *James E. Rice v. United States*, note 182, *supra* at 910 (1970), in which the Court said: "The subject matter—costs, expenses, losses—is appropriately proven by books and records rather than by conclusory assertions without supporting detail * * *."

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Here there is alternative evidence in the record furnished by the Government purporting to represent the actual cost of each bid item (Government Exhibit B-621). It is based upon Government analyses of appellant's labor expense, material expense, subcontracts, operating cost, equipment cost, freight, and miscellaneous overhead.⁴⁵⁹ Exhibit B-621 shows total revenues to the appellant of \$1,616,271.03 and total costs of \$1,029,257.51.⁴⁶⁰

What the Government did was to "cost," for example, the equipment expense, both operating and ownership, in a manner comparable to that shown in the appellant's bid (Appellant Exhibit C-190). The Government extracted cost figures for all major pieces of equipment from schedules of depreciation maintained in the course of business for both corporate and partnership equipment.⁴⁶¹ Such capitalized

values include all of the appellant's properly allocated costs for the acquisition of the equipment for the job at Lost Creek, and these are represented in Exhibit C-190.

The Government's position is that the appellant's records are sufficiently detailed to allow allocation to individual pieces of equipment of all freight costs and costs of setup, and the other items covered under column 6, p. 1, of Exhibit C-190. According to the Government, the data found in Exhibit B-621 and accompanying exhibits are traceable to specifically identified sources, over 97 percent of which are found within the appellant's system of books and records.⁴⁶² For example, appellant's accounts carry detailed records of such costs as repairs, fuel, oil and grease, and tires, which the Government allocated to bid items by following standard accounting and construction cost-keeping procedures.

It appears, however, that no contractor record data were available in certain instances. Mr. Steenberg testified that time cards, which showed the hours each piece of equipment was being used and the purpose for which it was being used, were lost in a fire (69 Tr. 7636).

Several accounts (particularly with respect to labor) were not specifically tied down to bid items. One such group is the handwritten list of expenses shown at the bottom of p. 5 of Government Exhibit B-599.

⁴⁵⁹ Government Exhibit B-601 shows total labor cost amounting to \$978,937.83. Government Exhibit B-605 shows total material cost amounting to \$261,792.12. Government Exhibit B-604 shows total subcontracts amounting to \$280,958.25. Government Exhibit B-609 shows total equipment operating costs amounting to \$581,311.37. Government Exhibit B-617 shows total equipment costs amounting to \$353,225.85. Government Exhibit B-620 shows total freight costs amounting to \$54,780.21. The total amount of miscellaneous overhead shown on Government Exhibit B-621 is \$184,522.91.

⁴⁶⁰ The total revenue figure includes an allowance for materials on hand, Order for Changes No. 4 and Utah sales tax. Excluding those allowances, appellant's total revenue is shown as \$1,601,100.91. Including Utah sales taxes of \$15,170.12, appellant's total costs are shown as \$1,044,427.63.

⁴⁶¹ A contractor is required to keep a depreciation schedule with respect to all capital items, such as equipment, which are to be capitalized and depreciated under the Internal Revenue Code (Depreciation Guidelines and Rules, Revenue Procedure 62-21, 26 CFR 1.167(a)-(1)).

⁴⁶² Government Posthearing Brief, 722, citing the testimony of Messrs. James H. Major, Government auditor, and Palmeter.

In addition, the appellant's own set of accounts carried an item called "Miscellaneous" (Government Exhibit B-600). These items, along with other amounts which were specifically identified as constituting overhead in the appellant's accounts, were distributed to bid items on the basis of labor hours worked.

The Government also distributed the cost of various materials to applicable bid items and allocated subcontract costs to specific items. With the exception of grouting and reinforcing steel subcontract costs, the appellant has not taken a strong position against the Government's treatment and method of distribution of such costs.

For all of these reasons we find that the Government's evidence respecting costs, which is based essentially on audited actual costs of performance, when compared with the appellant's, presents a more reliable and realistic picture. It, however, contains a significant weakness. The Government analysis does not give any consideration to the costs of subcontractors, Prepakt, Holman Erection Company and M & S. The omission of M & S equipment expense is regarded as particularly serious, in view of the relationship of M & S to those aspects of the claims with respect to which we have found that the appellant is entitled to an equitable adjustment.

The real difficulty, though, with the evidence of cost we have before us is the fact that it is not segregated. It has not been pinpointed

to the various elements of each claim. Rather, the matter of costs has been given broad brush, generalized bid item treatment.

Therefore, because of the imponderables and unknown factors involved, it is not possible to arrive at a precise mathematical determination concerning the proper quantum of the equitable adjustment to which the appellant is entitled.⁴⁶³ While the evidence on quantum leaves much to be desired, the Board finds it to be sufficient to provide a reasonable basis for a determination of the equitable adjustment by the jury verdict approach.⁴⁶⁴ Even though some degree of estimation is entailed thereby, such an approach is regarded as preferable to utilization of the total cost method.⁴⁶⁵

Accordingly, taking into consideration the entire record before us,

⁴⁶³ See *Cosmo Construction Company*, note 100, *supra*, 73 I.D., at 244, 66-2 BCA at 26,755.

⁴⁶⁴ See *Pilcher, Livingston & Wallace, Inc.*, note 457, *supra* at 39,455, in which the ASBCA held that a board is not prevented from deciding the quantum issue on a jury verdict basis, even though the evidence on quantum "leaves much to be desired," if that evidence offers a "reasonable basis of computation thereof."

⁴⁶⁵ *Warren Painting Company, Inc.*, note 450, *supra*, at 41,796 ("Even though this method may involve some degree of subjective judgment or speculation, it is by far preferable to the total cost method of pricing contract changes or extra work.") Under jury verdict decisions, neither mathematical exactness nor computations to support the amounts awarded are necessary (*Lincoln Construction Company*, note 79, *supra*, 72 I.D., at 504, 65-2 BCA at 24,588, and cases cited in n. 8 thereof; *Ford Construction Co., Inc.*, AGBCA No. 252 (July 9, 1971), 71-2 BCA par. 8966, at 41,687; *Pilcher, Livingston & Wallace, Inc.*, note, 457, *supra*, at 39,456; *C. H. Leavell & Company*, GSBCA No. 2901 (August 19, 1970), 70-2 BCA par. 8437, at 39,256).

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giving due weight to all the evidence adduced at the hearing and attempting to resolve fairly the conflicts therein and the disparate arguments of the parties, the Board holds that the appellant is entitled to an equitable adjustment in the amount of \$170,000.⁴⁶⁶

SHERMAN P. KIMBALL, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

DEAN F. RATZMAN, *Alternate Member*.

UNITED STATES

v.

RICHARD M. LEASE

6 IBLA 11

Decided May 10, 1972

Appeal from decision by hearing examiner Graydon E. Holt declaring placer mining claim to be null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Common Varieties of Minerals: Special Value

Dolomite which can only be used as aggregate in road construction, ground

⁴⁶⁶ The adjustment covers those claims with respect to backfilling, rolling, mis-staking of roadway side slopes, misdettailing of bars, concrete mixing and slump, and overruns or underruns relating to Bid Items 4, 5, 6, 8, 9, 10, 14, 24, 27, and 34. In addition, the appellant is entitled to a time extension of 28 days for backfilling and to a further allowance of \$37.62 for its reservoir level gage piping claim, as discussed *supra*.

cover, leach lines and other purposes for which common varieties of sand, stone and gravel may be used must be considered a common variety under section 3 of the Act of July 23, 1955, unless it can be shown to have a unique property giving it a special and distinct value as reflected by a substantially higher commercial value for the dolomite than other materials used for the same purposes.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Marketability

Although a deposit of dolomite may be considered an uncommon variety within section 3 of the Act of July 23, 1955, if suitable for metallurgical use, the prudent man test of *Castle v. Womble*, as complemented by the "marketability at a profit" test, must be satisfied to sustain a placer mining claim for the deposit.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Marketability

If a deposit of dolomite is locatable under the mining laws only because it can be used for metallurgical and other uses for which common varieties of sand, stone, gravel, etc., cannot be used and has no property giving it a special and distinct value otherwise, the sales of the dolomite for purposes for which common varieties of materials can be used cannot be considered to establish the marketability at a profit and value of the deposit for the metallurgical and other uncommon variety uses.

Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Marketability—Rules of Practice: Government Contests

In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is

being met by more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes.

Mining Claims: Contests—Mining Claims: Discovery: Generally

A mining claim for dolomite is properly declared null and void where it is concluded that there was not a sufficient market for metallurgical and other uncommon variety uses for the dolomite to justify the costs of mining the claim solely for such uses.

APPEARANCES: Fred H. Almy, attorney for appellant. Charles F. Lawrence, Office of General Counsel, U.S. Department of Agriculture, attorney for appellee.

OPINION BY MRS. THOMPSON INTERIOR BOARD OF LAND APPEALS

This appeal by Richard M. Lease is from a decision by hearing examiner Graydon E. Holt, dated October 20, 1969, declaring Lease's Sharpless Dolomite No. 1 placer mining claim to be null and void for lack of discovery of a valuable mineral deposit.¹

This claim contains 160 acres in section 7, T. 2 N., R. 1 E., S.B.M., California, within the San Bernardino National Forest and approximately one mile north of Big Bear Lake. It was located July 2, 1957,

by eight locators. Following mesne conveyances, appellant acquired the claim by a quitclaim deed dated January 1, 1964 (Ex. 5).²

In 1965 a contest against the claim was initiated by the Forest Service, United States Department of Agriculture, charging that a discovery of locatable minerals had not been made within the claim or any of its subdivisions, that the land is nonmineral in character, and that the land is not chiefly valuable for building stone. In a previous decision dated April 1, 1966, hearing examiner Holt declared the claim to be null and void for lack of discovery of a valuable mineral deposit under the mining laws. He found the material allegedly giving validity to the claim, dolomite, to be a material of widespread occurrence used by the contestee for purposes for which common varieties of sand or stone could be used, and thus a common variety of material within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). He also found the contestee failed to show that the deposit of dolomite was marketable for uses for which common varieties of sand and stone would not be suitable.

From the hearing examiner's decision of April 1, 1966, Lease appealed to the Director, Bureau of Land Management, requesting a

¹ The appeal was made to the Director, Bureau of Land Management. However, jurisdiction over appeals to the Director, as well as appeals to the Secretary of Interior, was transferred to this Board effective July 1, 1970. 35 F.R. 10012.

² In this decision, exhibits produced at the hearing may be cited by the number or letters there given as "Ex. ____". The transcripts of the hearings shall be cited as "I Tr. ____" for the first hearing held November 4, 1965, and "II Tr. ____" for the second hearing held March 13, 1969.

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further hearing to show that the dolomite was marketable for metallurgical purposes. This request was granted by the, then, Bureau's Office of Appeals and Hearings in its decision of October 10, 1968. The present appeal arises from the hearing examiner's decision upon the rehearing. In his decision of October 20, 1969, the hearing examiner ruled expressly that whether the dolomite deposit is a valuable mineral deposit under the mining laws depends upon whether there is a sufficient market for it in the metallurgical and chemical industries to justify an extraction and processing operation. He refused to consider the profitability of the mining operation for uses for which common varieties of materials were readily available as an element in determining the profitability of the dolomite for the uncommon variety purposes. As to the facts he concluded as follows:

From the evidence in the present case it is clear that a successful operation of this claim requires a production of 10,000 tons or more a year, that this volume can and has been produced and sold profitably, that during the last year of operation approximately 16,000 tons of dolomite was [sic] processed and sold, that 90% of this production was used for purposes in which common variety materials can be used and 10% for metallurgical purposes, and that there is a possibility of increasing the sales for this latter use. However, there was insufficient evidence to justify a finding that there is a present or potential future market for 10,000 tons a year of the material for use in the metallurgical, chemical, or pharmaceutical industries. In the absence of sufficient evidence to

justify such a finding it must be concluded that the dolomite on the claim does not constitute a valuable mineral deposit under the present mining laws.

Appellant contends generally that the dolomite material is an uncommon variety and the only question in this appeal is whether it has been and can be mined and sold at a profit. Appellant asserts that it has been and can be sold for metallurgical purposes at a greater profit than for nonmetallurgical purposes, except that the development of the market for metallurgical use has been difficult because of Governmental litigation against the claim.

Because this claim was located after the Act of July 23, 1955, it can be sustained only if the dolomite material for which it is allegedly valuable is not a common variety of material under that Act. The Act removed common varieties of sand, stone, etc. from the operation of the mining laws. As appellant states in this appeal, at the time of the first hearing (November 4, 1965) :

the evidence disclosed that the rock extracted to the date of hearing had been utilized almost exclusively for the same purposes of aggregate, etc. for which other widely dispersed and easily available sands and gravels were similarly used.

Ordinarily if a mineral product can only be used for the same purposes for which widely available common varieties of sand, stone, gravel, etc. may be used, it must also be considered a common variety unless it can be shown to have a unique property giving it a special and distinct value

as reflected by a substantially higher commercial value for the product. *United States v. Norman Rogers*, A-31049 (March 3, 1970); *United States v. Paul M. Thomas, et al.*, 78 I.D. 5, 1 IBLA 209 (1971). There is no evidence in this case that the dolomite has any unique property giving it a special and distinct value for use as aggregate in road construction, ground cover, leach lines, and the other purposes for which common varieties of sand, stone, etc. may be used. It does not meet the test of being an uncommon variety for those uses.

A deposit of stone may also be considered an uncommon variety within the meaning of the Act of July 23, 1955, if it has physical properties giving it a special and distinct value for uses for which common varieties of sand, stone, etc. may not be used. *Id.* It was assumed in the hearing examiner's decision that the dolomite within this claim may be used for uncommon variety metallurgical purposes. We do not dispute this assumption. For a detailed discussion of the grade requirements and qualities for limestone product, including dolomite, to meet metallurgical and chemical standards see *United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331 (1969) (a request for reconsideration of certain aspects of this case is under advisement by this Board). Assuming then that some of the deposit of dolomite may be in an uncommon variety because it meets the standards for metallurgical

uses,³ we reach the issue suggested by appellant as to its marketability.

As appellant concedes, although a deposit may be considered an uncommon variety within the meaning of section 3 of the Act of July 23, 1955, the validity of the claim then depends upon whether there has been a discovery of a "valuable mineral deposit" within the meaning of the general mining laws (30 U.S.C. § 22 *et seq.* (1970)). This determination is made by applying the prudent man test of *Castle v. Womble*, 19 L.D. 455 (1894), as complemented by the "marketability at a profit" test approved in *United States, et al v. Coleman, et al.*, 390 U.S. 599 (1968). *United States v. Albert B. Bartlett, et al.*, 2 IBLA 274, 78 I.D. 173 (1971). This test requires evidence that the material from the claims is marketable at a profit so as to justify a prudent man in reasonably expecting that by expending further time and money a valuable mine may be developed on the claim. The test applies to this dolomite deposit.

The crucial question raised in this case is whether in applying the test here we must consider those profits which have been or may be attained from selling the material for the purposes for which common varieties of materials concededly may be used in order to determine the value

³ This assumption would only pertain to such 10-acre tracts on the claim which have been excavated and mined as the evidence did not clearly show that the material would meet metallurgical or chemical standards throughout the 160 acres. See 43 CFR 3842.1-3 and 1-4 (1972).

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of the deposit as a locatable uncommon variety material. In other words, did the hearing examiner in applying the marketability and prudent man test correctly differentiate between sales of the dolomite for metallurgical uses and sales of the material for the common variety uses?

Although appellant alleges there is a difference in profitability between sales of the dolomite for the metallurgical use and the common variety uses, he also apparently relies on the sales of the dolomite for common variety uses to show that the claim can be mined profitably. This is reflected by his contention that since the mineral is dolomite and there is "no subordinate or lesser included deposit within the dolomite," this case is distinguishable from *United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968). That case held that the value of a gold deposit must be established independently of the profits which could be anticipated from the sale of the ambient common varieties of sand and gravel. The rationale of that case is that the value of the deposit of mineral which remains locatable under the mining laws since the Act of July 23, 1955, must be determined independently of the value of the deposit for other purposes. In that case the distinction was made between a metallic mineral and a non-metallic, common variety mineral product no longer locatable under the mining laws since the Act of July 23, 1955. In *United States v.*

Chas. Pfizer, *supra*, at 348-49, a similar distinction was made between limestone materials of varying qualities. The following discussion in that case is of interest:

In determining whether a discovery has been made * * *, the critical consideration is whether a discovery has been made only of the *uncommon* variety of limestone on the claim. No consideration can be given to the value of the *common* variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association with a common variety. It cannot ride piggy-back, as it were, on the shoulders of a common variety. See *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963); *cf. United States v. Mt. Pinos Development Corp.*, 75 I.D. 320 (1968). Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

To put it more concretely, suppose that a 99 percent carbonate rock is so evenly intermingled with a No. 4 80 percent carbonate rock that in order to obtain one ton of the 99 percent rock it is necessary to mine two tons of the intermingled material. Suppose that mining costs are \$3 per ton so that it costs \$6 to extract the 2 tons of mixed material. Suppose further that the 99 percent rock sells for \$5.50 per ton and the No. 4 rock at \$1.50 per ton. Obviously it would be unprofitable to spend \$6 to produce \$5.50 worth of 99 percent rock, whereas it would be profitable if the \$1.50 return for the No. 4 material could be counted in. This is plainly impermissible, however, for it is tantamount to saying that the discovery of a locatable mineral, insufficient in its self, can be perfected by a discovery of a

nonlocatable mineral on the claim. [Footnote omitted]. Thus, in our example, the intermingled No. 4 rock must be treated as if it were a granite or other worthless rock. To hold otherwise would be to permit the easy frustration of the Congressional intent to bar location of common varieties after July 23, 1955.

We believe that the rationale in the distinction in *United States v. Mt. Pinos Development Corp.*, *supra*, and *United States v. Chas. Pfizer & Co., Inc.*, *supra*, between the sale of the locatable and non-locatable mineral products applies with equal force here to the sales of the dolomite for common variety purposes and uncommon variety purposes. This conclusion is supported by the language quoted above from *United States v. Chas. Pfizer & Co., Inc.*, and is reinforced by the legislative history of section 3 of the Act of July 23, 1955. In discussing the language in section 3 that common varieties do "not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value," the House Committee on Interior and Insular Affairs stated that this language "would exclude materials such as limestone, gypsum, etc. commercially valuable because of 'distinct and special' properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Committee on Interior and Insular Affairs stated that:

[The] language is intended to exclude from disposal under the Materials Act [now 30 U.S.C. § 601 (1970)] materials that are commercially valuable because of "distinct and special" properties, such

as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like. S. Rep. No. 554, 84th Cong., 1st Sess. 8 (1955).

The language in both of these reports emphasizes the value of the limestone, for example, because of "distinct and special" properties making it useful for special commercial purposes. This emphasis is echoed in the Departmental regulation defining common varieties and uncommon varieties, as follows:

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit *has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation*. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. *Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties."* This subsection does not relieve a claimant from any requirements of the mining laws. [Italics added] 43 CFR 3711.1(b), 35 F.R. 9731 (formerly 43 CFR 3511.1(b)).

The penultimate sentence of the regulation sets forth the specific

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commercial uses mentioned in the Senate Report, classifying limestone "and the like" of metallurgical or chemical grade as an uncommon variety. The regulation thus reflects the recognition and distinction manifested in the legislative history of section 3 of the Act of July 23, 1955, between common and uncommon varieties because of special values for particular, special commercial uses. The last sentence of the regulation makes it clear that the requirements of the mining laws must be met. Therefore, it is obvious that even though a material may fall within the special classification made in the regulation, the requirements of the prudent man and marketability tests would still have to be satisfied to sustain a claim having a deposit deemed an uncommon variety.

From the legislative history of the Act and the language in the regulation it appears to have been contemplated that only the value of the product for an uncommon variety use which removes the mineral product from the category of common varieties would make the deposit of the product commercially valuable. Of course, a mineral product intrinsically may have commercial value, yet, the mineral deposit may not be mined profitably because of economic factors such as the prohibitive costs of the mining operation compared with the market place price. A claim for such a deposit could not be sustained. See, e.g., *Adams v. United States*, 318 F.2d 861, 870 (9th Cir. 1963); *Unit-*

ed States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969).

In view of the distinction between common and uncommon varieties in the Act, its legislative history, and the regulation as to the type of commercial use value contemplated for the mineral product, section 3 of the Act, expressly providing that no deposit of common varieties "shall be deemed a valuable mineral deposit within the meaning of the mining laws," would be negated if we were to hold that sales of the dolomite for common variety purposes could be used to make the mineral deposit valuable within the meaning of the mining laws. The purposes of the Act are served by holding that we will not look to sales for common variety purposes in order to determine the profitability of a mining operation for an uncommon variety of stone. This holding is in accord with other determinations as to what factors may be used in determining whether or not a mineral deposit is valuable. For instance, it is obvious that in determining whether a profitable mining operation can be anticipated to satisfy the prudent man test, we cannot look to other values upon a claim, such as the value of the sale of timber therefrom. We have indicated that under the rule in *United States v. Mt. Pinos Development Corp.*, *supra*, the value of a gold deposit may not be determined by considering the sale of common varieties of ambient sand and gravel. Also, in *United States v. Chas. Pfizer & Co., Inc.*, *supra*, the value of an uncom-

mon variety high grade limestone deposit may not be determined by adding the value of the common variety of limestone.

Therefore, if a deposit of an uncommon variety of material may not be profitably sold for the uses for which it allegedly has a special value, we conclude that it may not be deemed to be a valuable mineral deposit under the mining laws although it may be sold for common variety uses; cf. *United States v. Harold Ladd Pierce*, 75 I.D. 255 (1968)⁴ and *United States v. Harold Ladd Pierce*, 75 I.D. 270 (1968); thus, a claim for such a deposit is invalid.

Since we conclude that the hearing examiner correctly differentiated between sales of the dolomite here for common variety and uncommon variety purposes, the remaining question is whether his finding that the marketability test for the uncommon variety uses of the dolomite was not met is supported by the evidence.

⁴ The following statement in this opinion, at 75 I.D. 260, expressly supports this conclusion.

"Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety (*United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965)) or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command (*United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968))." * * *

In reviewing the record, it is apparent that at the time of the first hearing there was insufficient evidence to show that the dolomite on the claims was then marketable at a profit solely for metallurgical or other allegedly uncommon variety purposes. Until marketability at a profit could be established, the claim could not be considered as having been validated by a discovery of a valuable mineral deposit.⁵ *United States v. Coleman, supra*.

The record at the second hearing further shows that most of the attempts to sell the material for metallurgical uses and to establish a market for other uncommon variety purposes were made after the first hearing. Appellant's lessee, D. E. Hayes, testified that he made only two sales for metallurgical purposes prior to the first hearing and none thereafter except through a sales agent, Brumley-Donaldson (II Tr. 90). Most of those sales apparently are reflected in exhibits L and 16,

⁵ If the evidence were to show satisfactorily that marketability at a profit was established after the first hearing was held in 1965, another problem would arise in this case because the claim contains 160 acres and appellant acquired his interest in the claim in 1964. The mining laws limit the acreage which may be located in a single placer claim to 20 acres for an individual or to a maximum of 160 acres for an association of 8 individuals (30 U.S.C. §§ 35, 36 (1970)). Therefore, although the association of 8 individuals in this case could locate a claim for 160 acres, unless a discovery was perfected prior to transfer of the claim to a single individual, he would only be entitled to perfect 20 acres of the claim. *United States, ex rel. United States Borax Co. v. Ickes*, 98 F.2d 271 (D.C. Cir. 1938); *Bakersfield Fuel and Oil Company*, 39 L.D. 460 (1911); *H. H. Yard, et al.*, 38 L.D. 59 (1909). This problem is only noted as our disposition of this case makes the resolution of this problem as to appellant unnecessary.

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discussed further, *infra*. The claim was under the control of Big Bear Rock & Materials Company for a time following the first hearing and Hayes testified that approximately 2 or 3 loads a month (a load being approximately 25 tons (II Tr. 3,4)) were shipped into the Los Angeles market for metallurgical purposes by that company (II Tr. 3,4). Another operator, Owl Rock Products, shipped 312 tons for metallurgical fluxing use (II Tr. 3,4). The records of these transactions were not available, however.

Most of the information concerning sales of the material from the claim for metallurgical purposes was during 1968. More detailed information was also furnished concerning sales for nonmetallurgical purposes during that year. Appellant's contention that the development of a market for uncommon variety purposes was thwarted because of court action does not hold up when we examine the facts, as will be seen *infra*. As shown by exhibit N-3, the United States District Court, Central District of California, in a proceeding, *United States v. Richard M. Lease, et al.*, Civil No. 67-1687-F, on January 25, 1968, enjoined Lease, Hayes, and other-named defendants from removing material in excess of 10,000 tons per year beginning January 1, 1968, and prescribed certain conditions to protect the surface of the claim. This order was modified April 10, 1968 (Ex. N-2), requiring further protective meas-

ures for slope stabilization to prevent erosion and other surface damage, but no change was made as to the amount of material that could be removed. On July 9, 1968, the court found that appellant's lessee had failed to take slope stabilization measures and otherwise failed to comply with the previous orders, and, therefore, ordered the defendants to cease operations until further order of the court.

These facts as to the court action in this case may be compared with those in *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971), where all mining operations for sand and gravel were prohibited by a court injunction although exploration was allowed. In response to a contention that the injunction prevented a showing of continued marketability and thus automatically invalidated the claim, the court found the contention to be meritless. It stated at 84:

* * * Although the temporary injunction previously entered by the District Court prevented any mining activities by appellants during the pendency of this appeal, we held in an earlier decision that the loss of a market for the sand and gravel resulting from the injunction could not be permitted to prejudice appellants' asserted rights to the Grout Creek claim. *United States v. Barrows*, 404 F.2d 749; 752 (9th Cir. 1968); *cert. den.*, 394 U.S. 974 (1969).

In the present case, appellant was not completely prevented from removing material from the claim until he failed to comply with the court's orders for protecting the

surface. Until then he could have removed a sufficient amount of material to establish its marketability for uncommon variety purposes.

Appellant contends that the hearing examiner's finding that there is an insufficient market for the dolomite for metallurgical uses is not supported and relies on testimony by a Government witness. This testimony was to the effect that the Los Angeles area market, where appellant might be competitive because of accessibility, needed only a total of approximately 10,000 tons a year of carbonate rock and most of this was being met by sales of limestone for foundry purposes, with additional uses by steel companies whose supplies are being met more competitively from other sources (see II Tr. 101-108). This testimony was adequate to establish *prima facie* that there was little market for the material and what market existed was being met from other sources. The burden of proof was then upon the contestee to show by a preponderance of the evidence that the dolomite could be marketed at a profit for uncommon variety purposes. *Cf. Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). This burden has not been met.

Much of appellant's own evidence supports the testimony of the Forest Service's witness on marketability and, indeed, raises a question as to whether the dolomite meets industrial standards for some of the uncommon variety purposes for

which appellant alleges it is valuable.⁶

Although the record shows that attempts were made prior to 1968 to market the dolomite from the claim for glassmaking or other special industrial purposes, nothing shows that such attempts were successful or economically feasible.

The real crux of appellant's contention that he profitably marketed and sold dolomite from the claims and at a higher profit than the sales for the common variety purposes is based upon exhibit L, an alleged summary of the tonnages and profits from the sales of dolomite during the period the court injunction was in effect in 1968. He contends that this summary, after certain computations are made, demonstrates that the sales for metallurgical purposes produced 13 percent of the

⁶ For example, appellant contends that the material is suitable for use by steel companies in making steel. However, each steel company has certain specifications for limestone and dolomite products. Exhibit P-2 is a letter of June 23, 1966, from the Kaiser Steel Corporation to Hayes' company, Tri-City Concrete, stating that it uses only 700 to 800 tons per month of raw dolomite sized $\frac{5}{8}'' \times \frac{1}{2}''$, and was already satisfied with its present source unless Hayes' product was equal to or better than that source and could be delivered at a lower cost. Although exhibit P-1 is Hayes' reply stating he believed his dolomite met the requirements and could be delivered to Kaiser at Fontana, California, for \$6.20 per ton less a discount of 20 cents per ton, "10th proximo", there is no evidence that any dolomite was ever sold to Kaiser. Kaiser had specified 33-35% CaO, 20 plus % MgO, and SiO₂ minus 1%. Exhibit 17 submitted by appellant's witness shows an analysis of crushed dolomite of the size Kaiser specified of 30.2% CaO, MgO 20.0%, and SiO₂ 1.1%. This would not meet Kaiser's specifications without upgrading. None of the other analyses of the dolomite in the record meets Kaiser's specifications.

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net income with only 10 percent of the tonnage sold for such purposes.

The hearing examiner, at n. 2 in his decision, indicated that after making corrections in the errors in the computations and deducting the delivery cost from the metallurgical income category, which was just shown as income, the percentage of production and income from metallurgical sales amounts to approximately 10 percent. The hearing examiner's corrections are supported by the record and we believe his conclusion is more accurate than appellant's computations. However, we have found so many errors in computations and in assumptions with respect to exhibit L, that little, if any weight, can be given to the alleged summary and what it purports to show.⁷ In our analysis of

the evidence (*see* the discussion in note 7), we find that except for a few sales which approximated or were 13 cents more than the average price received for the nonmetallurgical sales and one sale approximately \$2.23 more per ton, the price for the metallurgical sales, after hauling charges are subtracted, was approximately 23 to 37 cents less than the average nonmetallurgical sales price.

Appellant contends there is no requirement in meeting the prudent man test that the sale of the dolomite for metallurgical purposes be more profitable than for nonmetallurgical purposes. Neither did the hearing examiner; nor do we establish such a rule. This evaluation of the evidence concerning all of the

percent rather than the nearly 10 percent shown on the exhibit.

⁷ The errors corrected by the hearing examiner by reference to invoice records would change the tonnage shown for metallurgical sales from 1,040.24 to 1,139.14 tons and the stated metallurgical gross income from \$7,927.85 to \$7,575.99. This figure does not reflect the hauling costs. At \$3.85 per ton for hauling subtracted from this figure, the alleged net income (actually, gross receipts) for metallurgical sales would be \$3,190.31. This would average \$2.80 alleged net profit (actually, gross price) per ton. With hauling costs computed at \$4 per ton, as the record indicates many were, the average figure would be reduced to \$2.65. This is closer to the figures testified to by contestee's witness in subtracting the hauling charges from the gross price received for the metallurgical sales, where most sales reflected a net of \$2.50 to \$2.65, with a few later sales netting f.o.b. mine price around \$2.85 to \$3 a ton and one sale netting \$5 a ton (*see* II Tr. 50, 61).

Exhibit L shows the gross tonnage for all sales as 10,702.07. However, our addition of the figures shown in that column totals 14,302.07. This would make the percentage of sales for metallurgical purposes to be nearly 8

We must also question the accuracy of the gross income shown on exhibit L. Appellant concedes that, at the hearing, it was brought out that this figure included the price of the metallurgical sales, including the hauling costs. If we subtract the metallurgical gross sales price of \$7,575.99 from the \$36,302.70 total gross income shown on the exhibit, we get \$28,726.71 alleged net profit (actually, gross receipts) from nonmetallurgical sales. This figure divided by the 13,162.83 tonnage figure for such sales (achieved by subtracting our corrected metallurgical tonnage from the corrected gross tonnage) would result in an average \$2.18 price per ton for the nonmetallurgical sales. This figure is much too low when we compare it with the other evidence in the record by appellant's witnesses, as to the prices received from the nonmetallurgical sales. Although exhibit L purports to contain a summation of sales not shown on exhibit 16 (a copy of sales records from the claim from January 1968 through June 1968), the bulk of the nonmetallurgical sales should be reflected on that exhibit. Our computation of the figures shown on exhibit 16 reflects an average of approximately \$2.87 per ton price, f.o.b. the mine, received for nonmetallurgical sales during that period.

sales of the material is important only for determining whether or not the claim can be profitably mined for the dolomite for its use for uncommon variety purposes apart from the profit that may be attained in selling the material for the common variety purposes. In any event, it is apparent, contrary to appellant's contentions, that the claim has been more profitable for its sales for purposes other than the metallurgical sales. It is significant in light of his contentions concerning the effect of the court order, that even after the order limited the tonnage to be removed from the claim, only approximately 8 percent of the tonnage removed was sold for metallurgical purposes rather than non-metallurgical purposes (*see* note 7). This belies those contentions.

Exhibit L is also misleading because it does not show a true net income figure, but actually shows only gross receipts. An evaluation of the costs of the mining operation with expected returns from the sale of the locatable mineral is proper to determine whether a prudent man would expect to develop a valuable mine. *Adams v. United States*, *supra*. No allocation has been made on exhibit L for any costs for the equipment and labor in making the dolomite salable in the sizes desired by the customer. Hayes, appellant's lessee, testified that as of December 1967 he had made a total investment of \$80,000 on the claim (II Tr. 89). He also stated in an affidavit

that the equipment on the claim, "six continuous belt conveyors, 3 sand and gravel screens, a tort [?] table, a primary crushing plant, an electric generating plant and other attached equipment," had a fair market value in excess of \$50,000. This did not include a 2 cubic yard Lorain power skid loader and hand tools also used (II Tr. 100). The amortization of this equipment and labor costs would obviously establish a far different income from that given in exhibit L.

Appellant does not dispute the hearing examiner's finding that there must be at least 10,000 tons of material produced from the claim to justify a mining operation. This finding is supported in the record. For example, Hayes testified that a mining operation removing 10,000 tons would be borderline (Tr. 35). The record does not show that appellant could market that amount for uncommon variety purposes or meet all the costs of the mining operation by such sales.

To conclude, the evidence shows that there was ample opportunity for the claimant to establish the marketability of the dolomite for uncommon variety purposes. Although there was some showing that the dolomite could be marketed for metallurgical uses, the evidence shows that it could not be marketed at a profit solely for such uses. As *United States v. Coleman*, *supra*, indicates, profitability is important in applying the prudent man test.

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We find the hearing examiner correctly concluded that there was not a discovery of a valuable mineral deposit locatable under the mining laws, and properly declared the claim to be null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the hearing examiner's decision is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

EDWARD W. STUEBING, *Member*.

STATE OF ALASKA
KENNETH D. MAKEPEACE

6 IBLA 58

Decided May 22, 1972

Appeal from a decision (AA 706) by Office of Appeals and Hearings, Bureau of Land Management, denying state selection application to the extent of land embraced in homestead application.

Reversed and remanded.

Alaska: Land Grants and Selections: Applications—Applications and Entries: Filing—Applications and Entries: Generally—Public Records—State Selections

A homestead application must be rejected when filed at a time when the

Master Title Plat in the local Bureau of Land Management office shows *prima facie* that the lands are embraced in a state selection application and the serial register sheet, referred to on the plat, shows that tentative approval has been given to the state selection for those lands.

APPEARANCES: William A. Sacher for the appellant; Joseph P. Palmer for the appellee.

OPINION BY MR. FISHMAN
INTERIOR BOARD OF LAND
APPEALS

The State of Alaska has appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated August 29, 1969, which reversed a decision of the Anchorage district and land office, dated February 15, 1967, rejecting the second homestead entry application (AA 706) of Kenneth D. Makepeace for the S $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 23, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 26, T. 7 N., R. 12 W., S.M. filed on February 2, 1967.

The stated reason in the land office decision for rejecting the homestead application was that the land office records “* * * show the lands to be included in the state selection application, Anchorage 050580. The regulations in 43 CFR 2222.9-5(b) (1970), provide that the filing of the state selection application segregates the land from all further appropriation based upon application or settlement and location.”

Mr. Makepeace appealed from the rejection of his homestead application to the Director, Bureau of Land Management, contending the land office was in error because: (1) state selection A-050580 was premature; (2) state selection A-050580 did not include the lands in his application for a second homestead entry; (3) the State of Alaska, in other cases, had stated that the State's filing is not intended to attach where a valid entry is relinquished and subsequently filed upon; (4) the state selection was filed on November 17, 1959, and amended on August 16, 1962, when the lands in question could not validly be selected, as they were withdrawn from all forms of appropriation because they were embraced in a prior existing homestead entry, A-047600, which lands were not restored to the historical index in the land office until January 20, 1965¹; (5) the state selection expressly excluded the lands described in his application in that it "excluded any prior valid rights, claims or patented lands," and at the time of selection the lands in issue were in the existing prior valid homestead entry A-047600; and (6) on the date his homestead entry application was filed, February 2, 1967, the lands were in the public domain available for homestead entry and not segregated by state selection application A-050580.

The record shows that on November 17, 1959, the State of Alaska filed selection application Anchorage 050580, under the Act of July 28, 1956, 70 Stat. 709, 711, 712, as supplemented by the Alaska Statehood Act of July 7, 1958, 72 Stat. 339-343; 48 U.S.C., Chap. 2, at pp. 11719, 11720 (1970).

The original selection application did not expressly describe the S $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 23, and the N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 26, T. 7 N., R. 12 W., S.M. Nor were these lands expressly described in the amended application filed on August 16, 1962, which described other lands in the aforesaid township. The following month the amendment was corrected to embrace the entire township, excluding "any prior valid rights, claims or patented lands."

The Office of Appeals and Hearings, acting for the Director, Bureau of Land Management, held that "since there was a valid existing right attached to the subject land at the time [of filing the selection application], i.e., the allowed homestead entry, Anchorage 047600 this land was omitted from the selection by the language in the State's amendment application." The decision further held that the State had not filed a new application nor amended the original application to include the lands in issue after they became available for selection, i.e. after the cancellation of the previous homestead entry was noted on the historical index in the land office on January 20, 1965, and it did not appear that such a new

¹ The record discloses the homestead entry was closed on January 20, 1965, and noted on the historical index on January 26, 1965.

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or amended application for selection had been filed by the State up to that time.

The decision referred to a letter of July 30, 1963, by the Director, Alaska Department of Natural Resources, addressed to the Bureau's State Director, regarding the State of Alaska blanket selections covering all available lands in a given area. The letter was concerned with the phrase "excluding any prior valid rights, claims or patented lands" and the segregative effect of such blanket selections, which stated:

On those selections the State has heretofore blanketed and which are now pending the State's filing is not intended to attach in cases where a valid entry is relinquished and subsequently filed upon.

With respect to a letter dated March 1, 1966, by the Director, Alaska Department of Natural Resources, which specifically retracted the 1963 letter, the Office of Appeals and Hearings held that the 1963 letter left no question as to the State's intention to exclude those lands from state selection A-050580 or its 1962 amendment, and further held that the 1966 letter could not retroactively change the wording or the intent of the State's amended selection application.²

The Office of Appeals and Hearings observed there was publication of the proposed selection of the

lands by the State shortly after the filing of the amended application. It held, since the lands in issue were expressly excluded from the amended selection application by reason of its inclusion in a valid entry, the publication of the notice while the entry was still valid could have no effect. After summarizing the administrative and judicial history of the *Kalerak* case,³ it found the case at bar distinctly different factually from *Kalerak* in that the State never had selected the lands in issue.

The decision went on to distinguish the case at hand from *John Gonzales*,⁴ A-30604 (September 26, 1968), pointing out that in *Gonzales*, notices of publication were published by the State after the lands became available for appropriation which notices were considered as reassertions of the State's selection which effectively segregated the land from further appropriation by application or settlement. The Bureau's decision held in the instant case there have been no notices published in connection with the lands subsequent to their restoration to the public domain, and, accordingly, any right or interest the State might have intended to claim was not reasserted or reaffirmed by the publication of notice.

² The Office of Appeals and Hearings correctly held that the 1966 letter could not change the state's application on a retroactive basis. As shown, *infra*, it possibly could operate prospectively as an amendment as of the date of its filing.

³ *The State of Alaska, Andrew J. Kalerak, Jr.*, 73 I.D. 1 (1966); reversed in *Kalerak v. Udall*, Civil No. A-35-66 (D. Alaska 1966); reversed in *Udall v. Kalerak*, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969).

⁴ *Gonzales* has a suit pending in the United States District Court of the District of Alaska, Civil No. A-128-68.

The Bureau also noted that subsequent to the notation of the cancellation on the land office records of homestead entry, Anchorage 047600, and without any request on the part of the State, the Anchorage land office decision of October 25, 1966, declared the lands in issue, among other lands, all described by legal description, as being proper for selection, and tentatively approved the selection of these lands under the selection application, Anchorage 050580. It held that there is no evidence in the record showing that the State was requested to, or had published, notices in accordance with that decision pointing out that the action taken by the land office in this regard was apparently in accordance with the Department's regulation 43 CFR 2222.9-4(d) (1967), now 43 CFR 2627.3(d) (1972). It observed that the Department has held that the tentative approval by the land office of a State selection serves to pass equitable title to the selected lands to the State, citing *Charles Schraier, Robert Schulein, et al.*, A-30814, A-30816 (November 21, 1967). It found that this ruling would prevail only where, prior to the tentative approval by the land office, the State had in fact made a proper selection of the lands involved, and it held that such was not the case here.

The Bureau's decision further held that even had the original or amended selection applications included the land in issue, they could

have no segregative effect with respect thereto and should have been rejected as to such land. It explained that at the time the applications were filed the lands were embraced in a valid existing homestead entry not subject to selection by the State, because they were not vacant, unappropriated and unreserved public lands within the purview of section 6(b) of the Alaska Statehood Act, *supra*, and the regulations thereunder, 43 CFR 2222.9-4(a) (1967), now 43 CFR 2627.3(a) (1972).

We need not decide whether the letter of March 1, 1966, from the State operated as an amendment to the State's selection application. The decision of the Bureau found that because the 1966 letter could not have retroactive effect, it has no effect. As of the time the letter of March 1, 1966, was filed, the lands in issue were not withdrawn or appropriated and there was no record notation precluding the State's application.⁵ Therefore, if indeed the letter constituted an amendment of the application, *Udall v. Kalerak*, 396 F.2d 746, 748 (9th Cir. 1968) supports our conclusion that the letter of March 1, 1966, could operate as an amendment:

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the

⁵ Makepeace's application was filed February 3 1967 and stated that residence had not been established on the land.

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amendments as a timely reassertion of Alaska's original application.⁶ * * *

It is noteworthy that the Office of Appeals and Hearings in essence considered that the lands in issue were not subject to application by the State of Alaska while they were affected by a notation of the existence of homestead entry, Anchorage 047600.

We agree with that conclusion. See *State of Arizona*, 55 I.D. 245, 246 (1935); *Keating, et al. v. Doll*, 48 L.D. 199 (1921); *Youngblood v. State of New Mexico*, 46 L.D. 109 (1917) cf. *Hastings and Dakota RR. Company v. Whitney*, 132 U.S. 357, 360-364 (1889); *Joyce A. Cabot, Allen B. Cabot, Walter G. Davis, et al.*, 63 I.D. 122 (1956); *R. B. Whitaker, Mrs. Jacqueline Anderson*, 63 I.D. 124 (1956); *State of Arizona*, 55 I.D. 249 (1935).

California and Oregon Land Co. v. Hulen and Hunnicutt, 46 L.D. 55, 57 (1917), holds:

* * * [t]he orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office. * * *

See *Earl Grece Louis Hall*, 58 I.D. 557, 560 (1943); Cf. *Stewart v. Peterson*, 28 L.D. 515, 519 (1899).

⁶ Although concededly the case at bar differs from *Kalerak* in that in the former the first manifestation of interest in the lands in issue was the letter of March 1, 1966, this is not seemed to be a significant line of demarcation. For the purposes of this decision, the letter of March 1, 1966 need not be construed as a revival of any preexisting application.

As pointed out in *Cabot, supra*, at 123, whether the outstanding record appropriation is void or voidable is immaterial. If such appropriation is outstanding on the tract books, the land is not subject to further appropriation, citing *Martin Judge*, 49 L.D. 171 (1922). See *Sarah Ann Christie*, 3 IBLA 7 (July 6, 1971); *George E. Conley*, 1 IBLA 227 (January 13, 1971).

It is true that in *Kalerak v. Udall*, Civil A-35-66, U.S.D.C. Alaska, October 20, 1966, the United States District Court found that the application of the State of Alaska, filed while the lands were withdrawn, " * * * was a nullity * * *" and " * * * [t]he so-called amendments, or additional selections during the 90-day period [restoration preference right period for the State to file selections], which did not embrace the lands selected on January 8, 1963 [at which time the lands were withdrawn], did not serve to validate the prior void selection."

The district court did not address itself specifically to the *Cabot* doctrine spelled out above, but implicitly it did not regard that doctrine as having any force.

However, the United States Court of Appeals for the 9th Circuit decision in *Kalerak*, at 396 F.2d 748, reversed the district court decision on the issue of the amendments and stated:

We need not decide whether the district court erred in declining to accept the Secretary's alternative ruling that

Alaska's original application, even if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

We adhere to the *Cabot* doctrine that an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records. We now proceed to consider the impact of the land office records as of the date the appellee filed his homestead application, *i.e.*, February 2, 1967.

We do not have definitive data as of February 2, 1967. However, the "Master Title Plat" dated March 17, 1967, covering "Land and General Titles" for the township in issue bears a notation "SS. A 050580. Amend, 8/16/1962 to include entire Tp. subject to valid rights, claims or patented lands."

This notation, standing alone, would seem to have segregated the lands in issue from the filing of the appellee's homestead application. However, the historical index for the township shows that the lands in issue had been embraced in homestead entry, A 047600, from June 24, 1959, and its termination was posted on the records on January 26, 1965. Thus reading the two records *in pari materia*, it would seem that the 1962 application of the State did not affect the lands in issue, since the lands in issue were appropriated by the record of the homestead entry and were not subject to application by the State. See *Hodges v. Colcord*, 193 U.S. 192, 194-196 (1904); *Cal-*

fornia and Oregon Land Co. v. Hulen and Hunnicutt, *supra*.

Nor is the State's amendment of March 1, 1966, reflected on the master title plat or on the historical index, or even on the serial register sheet for the state selection application. However, that serial register sheet shows that on October 25, 1966, tentative approval of the state selection was given as to the lands in issue.

Thus, it appears that on February 2, 1967, the plat showed *prima facie* that the lands in issue were embraced in the state selection application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.

Either on the basis of the *prima facie* appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection application, the land office records reflected the appropriation of the lands in issue.

We believe that the proper filing of the homestead application cannot be predicated on a "pick and choose basis," *i.e.*, an assertion by the appellee that he relied upon the plat and historical index to the exclusion of the state selection serial register sheet, particularly where the plat referred to the state selection application. Cf. *Southwestern Petroleum Corp. v. Udall*, 361 F. 2d 650, 657

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10th Cir. 1966), affirming 71 I.D. 206 (1964).

In sum, the Bureau decision correctly applied the notation rule to preclude the filing of the state selection application when the land was affected by a homestead entry. As pointed out above, the rule is properly also applied to appellee's homestead application, filed at a time when the records reflected the tentative approval of the outstanding state selection, regardless of whether that selection was valid, void, or voidable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the cases are remanded to the Bureau of Land Management for action consistent with this decision.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

JOAN B. THOMPSON, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

UTAH POWER AND LIGHT COMPANY

6 IBLA 79

Decided May 22, 1972

Appeal from decision (9181, Group 376, Idaho) by the Chief, Division of Cadastral Survey, Bureau of Land Management, dismissing protest against the acceptance of a plat of survey.

Hearing ordered.

Boundaries—Patents of Public Lands: Generally—Public Lands: Riparian Rights—Surveys of Public Lands: Generally

In determining what land is conveyed under patents or grants of public land bordering on a meandered body of water, the general rule is that the waterline itself, not the meander line, constitutes the boundary except where there is fraud or gross error shown in the survey of the lines or where the facts and circumstances disclosed an intention to limit a grant or conveyance to the actual traverse lines.

Secretary of the Interior—Surveys of Public Lands: Generally—Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys.

Federal Employees and Officers: Authority to Bind Government—Surveys of Public Lands: Generally

The action or inaction of Department employees cannot under the doctrines of estoppel or laches bar the Secretary of the Interior and his delegates from discharging their duty to determine if public lands have been omitted from an original survey and to survey those lands found to have been omitted.

Rules of Practice: Appeals: Hearings—Rules of Practice: Hearings—Surveys of Public Lands: Generally

Although there is no right to a formal hearing on a protest against an omitted lands survey, the Board of Land Appeals may, in its discretion, order a hearing on the factual issues where warranted by the circumstances.

APPEARANCES: Terry L. Crapo, Holden, Holden, Kidwell, Hahn and Crapo, Idaho Falls, Idaho, attorneys for appellant.

*OPINION BY
MRS. THOMPSON*

*INTERIOR BOARD OF LAND
APPEALS*

This is an appeal by the Utah Power and Light Company from a decision dated May 20, 1969, whereby the Chief, Division of Cadastral Survey, Bureau of Land Management, dismissed the appellant's protest against the Bureau's acceptance on November 22, 1968, of the plat of survey of certain lands in sections 15 and 16, T. 1 N., R. 37 E., Boise Mer., Idaho, along the Snake River, purportedly omitted from the original survey of that township approved on August 25, 1877.

The record shows that on February 5, 1969, a notice of acceptance of the more recent plat and the proposed official filing of it in the Idaho land office was published in the *Federal Register*, 34 F.R. 1734. The proposed filing was suspended until further notice. 34 F.R. 5447 (March 13, 1969).

Appellant filed a protest against survey on March 13, 1969, alleging that it owns lands bordering on the Snake River and that the effect of the resurvey is to deprive it of such lands.

There is no apparent disagreement among the parties with the following statement of facts as set forth in the decision appealed from:

The exterior boundaries, subdivisional lines, and meanders of the Snake River in T. 1 N., R. 37 E., B.M., were originally surveyed by John B. David, Deputy Surveyor, in 1877, under a contract dated October 23, 1876. The plat representing these surveys was approved by the Surveyor General of Idaho on August 25, 1877. Patents based upon this plat were issued to Andrew T. Lawrence for lot 2 and W $\frac{1}{2}$ SW $\frac{1}{4}$, section 15, this township, under Final Certificate No. 467, Blackfoot Land Office, on July 18, 1893 and to Jannet Kerr for lot 3, section 15, and lots 5 and 6 of section 10, this township, under Final Certificate No. 590, Blackfoot Land Office, on October 24, 1894. Section 16, as it is shown on the 1887 plat, went to the State of Idaho as a Common School Grant under the Statehood Act of July 3, 1890 (26 Stat. 215). It appears that, through a chain of title, the Utah Power and Light Co. has acquired the lands described as lots 2 and 3, section 15, and lots 1 and 2, section 16.

The company's protest was considered by the Bureau as relating to the dependent resurvey of sections 15 and 16, T. 1 N., R. 37 E., B.M., and the showing of omitted lands along the Snake River fronting on lot 2, section 15 and lots 1 and 2, section 16. Lot 3, section 15, is unaffected by the resurvey in question.

According to the records, the Bureau of Land Management in April 1961 ordered an investigation and a conditional survey of land purportedly omitted from prior surveys in T. 1 N., R. 37 E., B.M., Idaho, among other townships. As stated in the decision below:

The purpose of the investigation and survey was to determine whether there are areas of land between the original meanders of the Snake River which are

actually islands separated from the main-land by channels of the river and which existed as land above the ordinary high-water mark of the river on July 3, 1890, when Idaho was admitted to the Union, and whether there are other areas of land between the original meanders which were omitted from the original survey "by reason of gross, erroneous location or by fraud."

The investigation resulted in a determination that along certain portions of the Snake River there are lands omitted from the original survey of the Snake River in sections 15 and 16 in T. 1 N., R. 37 E., B.M., among others.

Plats of survey describing 21.99 acres of omitted land in section 15 and 70.80 acres of omitted land in section 16, T. 1 N., R. 37 E., B.M., were accepted in behalf of the Director, Bureau of Land Management, on October 22, 1968.

The Bureau's decision stated that according to the official plat of survey approved August 25, 1877, the area of the lots under consideration conveyed to the patentees were:

	Acres
Section 15, lot 2-----	30.43
Section 16, lot 1-----	42.14
Section 16, lot 2-----	43.25
Total-----	115.82

The decision also stated that according to the plat of survey accepted on October 22, 1968, there are areas of land opposite the above described lands lying between the east meander line or left bank of the Snake River as shown on the 1877 plat, and the actual east bank of the river as represented on the 1968 plat, to the following extent:

	Acres
Opposite Lot 2, sec. 15—lot 5-----	12.66
Opposite Lot 1, sec. 16—lot 8-----	8.80
Opposite Lot 2, sec. 16—lot 9-----	19.59
Total-----	41.05

No omitted land is represented as being opposite lot 3, section 15. [Lot 3 is along the west or right bank of the Snake River.]

The Bureau decision noted that, disregarding lot 3, section 15, the total patented acreage of lot 2, section 15 and lots 1 and 2, section 16, is 115.82 acres, and the total area of omitted lands lying opposite these lots, as shown on the 1968 plats, is 41.05 acres. [An omission of 35.48 percent.] In comparing the entire acreage of omitted lands with the entire acreage of adjoining patented lands in each section, it pointed out there are 21.99 acres of omitted lands fronting on 55.85 acres adjoining patented lands in section 15, an omission of 39 percent, and there are 70.80 acres of omitted land fronting on 96.97 acres of adjoining patented land in section 16, an omission of 73 percent. In addition to concluding that the omission of lands was significant to show the original survey did not correctly meander the river and resulted in fraud upon the Government, the decision stated the following facts demonstrate that this stretch of the river was not correctly meandered:

During the investigation and survey represented on the 1968 plat, it was found that the omitted lands averaged 10 feet above the surface of the Snake River in section 15 and 20 feet above the river surface in section 16, and are about the same elevation as other lands fronting on the

river in these sections not claimed to be omitted. With the exception of some canal work on the east side of the river in these sections, there is no evidence that the course of the river has substantially changed from its present location by erosion or accretion since the original survey in 1877.

There are two major thrusts to appellant's contentions on appeal from the Bureau's decision. The first relates to this department's authority to conduct the survey of the omitted lands; the second relates to the sufficiency of the facts to support the survey. Appellant has also requested a hearing.

On the first point appellant contends that regardless of the meander line established by the 1877 survey, the true boundary of its property is the Snake River. In determining what land is conveyed under patents or grants bordering on a meandered body of water the general rule is that meander lines are not to be treated as boundaries, their purpose being to produce an average definition of the sinuosities of the body of water "closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream," *Mitchell v. Smale*, 140 U.S. 406, 413 (1891). Rather, the lake or stream itself is the true boundary. See also *United States v. Lane, et al.*, 260 U.S. 662 (1923); *Railroad Company v. Schurmeir*, 74 U.S. (7 Wall.) 272 (1868).

There are exceptions to the general rule that the water body rather than the meander line is the boundary. In *Mitchell v. Smale, supra*, at

413, the Supreme Court indicated that where there was mistake or fraud in the survey the Government is not bound and the survey can be corrected. In *Lee Wilson & Company v. United States*, 245 U.S. 24, 29 (1917), the Court indicated that where through fraud or error a meander line is mistakenly run, riparian rights do not attach because the existence of the body of water upon which they depend does not exist, and the Land Department (now Department of the Interior) has power to survey the excluded area and to dispose of it lawfully. In *Producers Oil Co. v. Hanzen*, 238 U.S. 325, 339 (1915), the Court discussed the general rule but then stated:

* * * facts and circumstances may be examined and if they affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries. It does not necessarily follow from the presence of meanders that a fractional section borders a body of water and that a patent thereto confers riparian rights.

These decisions establish three situations in which meander lines will serve as the boundary of a conveyance or grant, rather than a water body: namely, where there is (1) fraud or (2) gross error shown in the survey, or (3) where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines. Clearly there is authority of the Secretary of the Interior to determine whether these situations obtain. Indeed, the Secretary of the Interior has a duty to determine what lands are public

lands, and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys. *Kirwan v. Murphy*, 189 U.S. 35, 54 (1903); *Burt A. Wackerli, et al.*, 73 I.D. 280 (1966)¹; *State of Oregon*, 60 I.D. 314 (1949).

Nevertheless, appellant contends that this Department is barred from exercising such authority in this case under the doctrine of estoppel because of the conduct of Departmental employees, beginning with the original surveyor and continuing with other employees who allegedly carried out flood control, reclamation and irrigation projects which reduced the flow of the Snake River from that in 1877, thereby lowering the mean high water line, causing the existence of the lands now claimed by the Bureau to have been omitted from the 1877 survey. It also contends the doctrine of laches bars this Department from making the resurvey due to the length of time between the original survey and the resurvey and because appellant and its predecessors have expended substantial sums of money in improving the land, relying on the patents and grants as extending the boundary to the Snake River.

The action or inaction of Departmental employees cannot under doctrines of estoppel and laches bar

this Department from discharging its duty to determine what lands are public lands and what lands have been omitted from the original survey. The fact that administrative officers have mistakenly treated an area as subject to riparian rights of abutting owners does not estop the Government from surveying the lands as public lands and disposing of them after it discovers the mistake. *Lee Wilson & Co. v. United States, supra*. As stated by the Supreme Court in *United States v. California*, 332 U.S. 19, 40 (1947); involving the ownership of submerged lands on the continental shelf:

* * * The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act.

See also *R. A. Beaver, et al. v. United States*, 350 F.2d 4 (9th Cir. 1965), cert. denied 383 U.S. 937, which held, in effect, that any implied acquiescence of Government officials to the plaintiff's improving lands did not under any doctrine of equitable estoppel or laches bar the Government from asserting its claim to riparian lands along the Colorado River, where there had been accretions due to the movements of the Colorado River, part

¹ A suit arising from this decision is currently pending in the Federal District Court for the District of Idaho, *Burt & Lueva G. Wackerli, et al. v. Stewart Udall, et al.*, Civil No. 1-66-92. The decision involves a protest against the survey of omitted lands along the Snake River in the township north of the township in this case.

of which may have been induced by actions of the Government.

Appellant contends that the Director's determination is defective as made without the existence of any record and based upon official notice of facts not open to inspection by appellant and which were not properly subject to official notice. There was a record. In the absence of some showing that appellant requested to see the records, such as the field notes of the surveys, survey plats, geological survey maps, etc., upon which the determination was based, this contention must be rejected. Inspection of Departmental records may be made in accordance with 43 CFR Part 2 (1972).

We come now to the question of whether the facts support the conclusion that these lands are omitted lands which may be surveyed as public lands under the exceptions to the general rule discussed previously that meander lines are not boundaries. Appellant contends, in effect, that the percentage of the acreage of the lands claimed as omitted from the survey by the Government is not sufficiently large as compared with the patented land to establish that there was such a mistake or fraud so as to bring the exceptions to the rule in operation. It has also raised a factual question concerning the levels of the river at the time of the original survey and the latest survey. As we have discussed, any actions by Government officials affecting the river would not estop the Government from

claiming omitted land as public land. If, however, appellant could establish that lands claimed as omitted are, in fact, accretions or relictions added to the patented lands since they were conveyed and since the original survey, because of changes in the river, such accreted or relicted lands could not be public lands omitted from the original survey.

Appellant has not submitted proof to support its allegations. Instead, it has requested that there be a hearing to prove the allegations. This Department in similar cases, e.g., *Burt A. Wackerli, supra*; *Giles R. and Juanita Leonard*, A-30503 (March 23, 1966), has indicated there is no right to a formal hearing on a protest against an omitted lands survey and has determined the factual questions on the basis of the record presented by the Bureau and information presented by appellant. Even though there is no right to a hearing, when an appellant requests a hearing to present evidence on factual issues, this Board has discretion to refer the case to an examiner for a hearing. 43 CFR 4.415 (1972). Although there is some support for the Bureau's findings in the record before us,² we believe appellant's request should be granted to give it the opportunity to present evidence to support its allegations. We believe the circumstances in this case warrant the presentation of evidence

² Apparently, however, we do not have the complete record before us as a note in the record indicates that some material is with the *Wackerli* litigation file. See n. 1, *supra*.

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and development of the factual bases for decision after a formal hearing.

The ultimate factual issue upon which evidence should be received is whether all of the circumstances of the original survey and conveyances made pursuant to that survey affecting the lands in question here show that there was a mistake or fraud in the survey or that the conveyances were intended to be limited to the meander line rather than the actual water line, so that land lying between the meander line and the water line may be surveyed as public land of the United States. In other words, does this case fall within the exceptions to the general rule that the water body is the boundary line rather than the meander line, as discussed above?

As indicated in *Burt A. Wackerli, supra*, some of the factors to determine are: the area of the land omitted as compared with the area patented, the value of the land at the time of the original survey, the difficulty involved in surveying the land due to its topography, and the distance of the original meander line from the actual water line. With respect to the first factor, explanation by experts of the different bases of comparison and reasons why one basis is of more validity than another would be helpful. With respect to the last two factors mentioned, expert explanations of the field notes of the original survey relating to those factors and any other factors which might have bearing, would also be helpful. For example, do the original survey field notes

or factual information revealed from the subsequent investigations indicate whether or not special instructions or general survey instructions of the Department were appropriately followed? Are there unexplainable deviations in the survey of the meander lines as compared with the rest of the survey which tend to show fraud or gross error? In addition, evidence may be presented of any changes in the water level of the river so as to affect the quantum of land lying between the meander line and the river bank between the date of the original survey and the latest survey.

At the hearing, the appellant will bear the burden of proof, it must go forward with evidence contradicting the facts stated in the Bureau's decision, and it must also bear the ultimate burden of persuasion.

This case shall be transferred to the Division of Hearings, Office of Hearings and Appeals, of this Department for assignment to an examiner for a hearing to be held in accordance with the rules in 43 CFR 4.430 to 4.439 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), a hearing is ordered and the case is transferred to the Division of Hearings, Office of Hearings and Appeals.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

NEWTON FRISHBERG, *Chairman*.

JOSEPH W. GOSS, *Member*.

**ESTATE OF JOHN J. AKERS
(DECEASED FORT PECK INDIAN
ALLOTTEE NO. 1921)**

1 IBIA 246

Decided May 24, 1972

Appeal from examiner's decision allowing attorney's fees and setting priority of payment of claims against the estate.

Reversed.

165.1 Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fees is not allowable as a charge against the estate where the services were performed on behalf of the attorney's client and were neither on behalf of the estate nor of benefit to the estate.

165.1 Indian Probate: Claim Against Estate: Allowable Items

A claim for attorney's fees by an attorney who successfully represented a client whose interests were in opposition to creditors of the estate and the heir at law is a private business matter with his client and not a proper claim against the estate as an administration expense.

165.13 Indian Probate: Claim Against Estate: Source of Funds for Payment

Where the restricted estate, consisting only of trust land, is awarded the devisee in the probate proceeding, the interest so received cannot be subjected to a claim for attorney's fees.

**OPINION BY MR. HARRIS
INTERIOR BOARD OF
INDIAN APPEALS**

The District Director of the Internal Revenue Service (Internal Revenue) has appealed an order,

entered February 20, 1969, by Hearing Examiner (Indian Probate) David J. McKee, directing distribution of John Akers' estate and setting priorities of payment on claims allowed against the estate.¹ There having been extensive litigation of the several issues involved in probating this estate we will set out a brief chronicle of significant events before reaching the issues raised by this appeal.

John J. Akers died on February 19, 1959. His will, dated December 10, 1958, was submitted for probate to Hearing Examiner Frances Elge on February 20, 1959. In his will John Akers in effect disinherited his wife Dolly with a bequest of one dollar, devised his mineral interest in real estate held in fee to his niece and in the residuary clause gave his sister, Hazel Trinder, his allotment in real estate held in trust for his benefit by the United States.

On March 13, 1959, proceedings began in a Montana court to probate the unrestricted estate of John Akers, including the mineral interest devised in the will to his niece; and which now includes approximately \$5,000 received as a cash bonus when the Superintendent executed an oil lease of these mineral interests on October 6, 1966. Subsequently, a dry well resulted and the lease was dropped. The unrestricted estate has received no other income. The estate is being administered under Montana law,

¹ Examiner McKee has since become chairman of the Board of Indian Appeals. He took no part in the decision of this case.

(DECEASED FORT PECK INDIAN ALLOTTEE NO. 1921)

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and an attorney, John Marriott Kline, was appointed as Special Administrator of the estate.

On April 20, 1959, the United States filed an irrigation claim against the restricted estate of John Akers in the amount of \$310.

After a lengthy hearing with sessions conducted in several places Examiner Frances Elge, in a written decision dated April 28, 1964, found that John Akers, as a result of alcoholism, lacked testamentary capacity when he executed the will dated December 10, 1959, disapproved it and transferred the case to Examiner McKee for further proceedings.

On November 5, 1964, Internal Revenue filed a claim to collect unpaid income taxes for which both John Akers and his wife, Dolly were alleged liable. The priority to be given the claim is an issue raised by this appeal.

On March 7, 1966, in a written decision, Examiner McKee found John Akers had testamentary capacity during lucid intervals and approved a will executed during such an interval on December 5, 1958. As in the will of December 10th, John Akers gave his wife one dollar, devised his mineral interest to his niece and in the residuary clause gave his sister Hazel Trinder his trust or restricted property. In that decision Examiner McKee fixed the Probate Fee due the United States at \$75, allowed the \$319 irrigation claim filed by the United States, and disapproved the

claim for unpaid income tax as having been untimely filed because it had not been filed before the conclusion of the first hearing as required by Departmental regulations.

Dolly Akers appealed the approval of the will and Internal Revenue appealed the denial of the claim for unpaid income taxes. The allowance of the irrigation claim was not contested.

On appeal, Examiner McKee's approval of the will was affirmed but his holding on the tax claim was reversed: it was found that the filing limitation does not apply to claims of the United States and the case was remanded to the examiner to receive proof of the claim filed by Internal Revenue. (*Estate of John J. Akers*, IA-D-18 (February 26, 1968)).

Dolly Akers filed a renunciation of the will and a claim for dower rights with Examiner McKee on June 20, 1968. On June 24, 1968, Mr. Hubert Massman, who had been the attorney for Hazel Trinder before Examiner Elge when the first will was disallowed and who had represented her before Examiner McKee when the second will was approved, filed a claim for attorney's fees. The disposition of that claim is also an issue raised by this appeal.

Examiner McKee issued a decision on June 24, 1968, in which he allowed the Internal Revenue claim in the amount of \$14,338.60. The claim of dower rights filed by Dolly Akers in her renunciation of the will

was dismissed as having no application against trust property.

Dolly Akers appealed. The dismissal of Dolly Akers' claim was affirmed as *res judicata* and the allowance of the Internal Revenue claim was affirmed in that it was based on a consent judgment of the Tax Court which had been entered in *Estate of John Akers, Deceased, John Marriott Kline, Special Administrator, and Dolly Coster Akers, Petitioner v. Commissioner of Internal Revenue, Respondent*, Tax Court Docket No. 61338 (May 25, 1964). See *Estate of John J. Akers, IA-D-18 (Supp.)* (September 23, 1968).

The supplemental decision's affirmation of Examiner McKee's holding was a final decision for the Department. On that basis Examiner McKee, on February 20, 1969, issued an order fixing attorney's fees and establishing priority of payment of claims against the John Akers estate. The order reads:

1. The probate fees shall be first paid; and

2. The attorney's fees to be allowed to Hubert J. Massman, attorney for the successful parties in this litigation are fixed at \$7,500.00, and all of the cash funds in the hands of the Superintendent, whether they be in the form of certificates of deposit or cash in the Individual Indian Money account, shall be devoted first to the payment of said fee and the income from the lands included in the inventory to be received in the future shall be devoted to the payment of said fee for so long as necessary to liquidate the full amount thereof; and

3. Priority of the United States claims for irrigation O & M charges and for payment of the Tax Court Judgment shall

be deferred until the payment of the attorney's fee is complete; * * *

Both Dolly Akers and Internal Revenue appealed. Dolly Akers' appeal was considered by the Secretary in a complete review *de novo*, although her appeal rights had been exhausted by her previous appeals. The Secretary issued his decision on June 1, 1970, in which Examiner McKee's approval of the will was affirmed and his denial of her claim to dower by her renunciation of the will were also affirmed.

Following the establishment of the Interior Board of Indian Appeals Dolly Akers appealed the Secretary's decision to the Board. The Board affirmed Examiner McKee's denial of the dower rights in allowing the will to stand and on a finding that Dolly Akers had obtained four appellate considerations of her claims instead of the one appeal authorized her, declared the Board's decision final for the Department. *Estate of John J. Akers, 1 IBIA 8, 77 I.D. 268 (1970)*.

Dolly Akers appealed the Board's decision to the U.S. District Court, District of Montana, Billings Division. The decision of that Court, *Akers v. Morton*, Civil No. 907 (D. Mont., September 22, 1971), affirmed Examiner McKee's finding that John Akers was competent, that his December 5, 1958 will require approval, that his property be distributed accordingly and affirmed the denial of dower rights to Dolly Akers. The District Court's Decision was appealed to the 9th Circuit Court of Appeals. That ap-

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peal was dismissed for lack of prosecution. *Akers v. Morton*, C. A. 9, 71-3002 (May 3, 1972).

The estate of John J. Akers over which the Secretary of the Interior has probate jurisdiction consists of a restricted allotment of land, held in trust in accordance with 25 U.S.C. sec. 348 (1964), which was appraised by the Superintendent at \$15,000 for probate purposes, and cash in the Individual Indian Money account of \$5,888.96 from the cash bonus and interest thereon obtained when the Superintendent executed an oil lease for the benefit of the estate on October 6, 1966.

Internal Revenue contends on appeal that the attorney's fee was improperly allowed against the estate or, in the alternative, that if proper it was improperly given a higher priority than the United States tax claim.

The Departmental regulations applicable to Indian Probate on February 20, 1969, the date of the order appealed from, are contained in Title 25, Subchapter C of the Code of Federal Regulations. The pertinent sections therein read as follows:

§ 15.1 Administration of estates.

The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. *Claims against the*

estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part. (Italics added.)

§ 15.25 Priority of claims.

(a) Claims shall be allowed priority in payment in the following order, except as is otherwise provided in paragraph (b) of this section:

(1) Probate fee;

(2) Claims for expenses not previously authorized, for last illness not in excess of \$500, and for funeral not in excess of \$250;

(3) Unsecured claims of indebtedness to the United States or any of its agencies;

(4) Unsecured claims of indebtedness to the tribe of which the decedent was a member or to any of its subsidiary organizations;

(5) [Reserved]

(6) Claims of general creditors, including that portion of expenses of last illness not previously authorized in excess of \$500 and that portion of funeral charges not previously authorized in excess of \$250.

(b) The preference of the probate fee and of other claims may be deferred, in the discretion of the examiner, in making adjustments or compromises beneficial to the estate.

(c) No claims of general creditors shall be allowed if the value of the estate is \$1,500 or less and the decedent is survived by a spouse or by one or more minor children. If the estate is valued in excess of \$1,500, or if the estate is valued at \$1,500 or less and the decedent is not survived by a spouse or by any minor children, the claims of general creditors may be allowed in the discretion of the examiner of inheritance. *If the income of the estate is not sufficient to permit the payment of allowed claims of general creditors within three years from the date of allowance, the unpaid balance of such claims shall not be enforceable against the estate or any of its assets. (Italics added.)*

§ 15.26 Claims for attorney fees.

ance costs, taxes, insurance, interest charges, the regulations in this part shall be allowed compensations in reasonable amounts. In determining attorneys' fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all interested parties. *Such fees as may be allowed shall be charged against the interests of the attorneys' clients.* (Italics added.)

A reading of the three sections discloses that under sec. 15.1 the examiner is bound by 25 CFR secs. 15.25 and 15.26 in approving claims against the estate and setting the priority of payments as well as in the setting of attorney's fees and their source of payment. Absent a showing that the attorney performed a service that was of benefit to the estate or on behalf of the estate so as to bring the allowance of a fee within the purview of sec. 15.25(b) and the examiner's discretionary authority to defer other claims, it must be presumed that when an attorney appears on behalf of a client his services were for the sole benefit of the client and his fee allowance by an examiner would be regulated by sec. 15.26.

In his brief on appeal Mr. Massman contends the first priority should be the expense of administration and that the services he has performed for the proponent of the will (his client, Hazel Trinder) benefited not only his clients but the estate and its creditors, in that, but for his efforts, the estate would have been distributed prior to the

time Internal Revenue became involved and therefore his services should be allowed as a proper expense of administration.

The position advocated by Mr. Massman is entirely untenable. Aside from the obvious fact that the many appeals of Dolly Akers has prohibited distribution of the estate, Internal Revenue has been protecting its own interests by filing appeals, and thus prohibiting distribution. Additionally, Mr. Massman's services were not sought on behalf of the estate and, in fact, the administration of the estate has been in the hands of the Superintendent who secured a property appraisal and executed an oil lease for the estate's benefit. Further, the Department has consistently refused to allow outside administrators or executors to act on behalf of the estates of Indians where trust or restricted property is involved. *Estate of Great Deal of Plenty Woman (Otarwin) or Elizabeth Saul*, C.C. #140 (37136-11). Finally, it is apparent that Mr. Massman's efforts, though strenuous, have always been directed to having John Akers' will declared valid in order that his client, the residuary beneficiary therein, might receive the entire restricted estate. Clearly the service of Mr. Massman to his client is service to a testate beneficiary whose interests are directly opposed to those of the decedent's intestate heir and creditors and as such are not a proper charge against the estate as an administration fee.

The claims of Internal Revenue and the Irrigation claim, when

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totalled, far exceed the \$5,888.96 in funds available to the estate to pay claims. However, until exhausted, this fund will be applied to pay these claims in accordance with the terms of this decision. The remainder or residue of the estate, consisting solely of trust land, passes to Hazel Trinder in accordance with the terms of John Akers' will.

Therefore, Hazel Trinder's only interest in the restricted estate is that of devisee of the trust land. Land to be continued in trust for an Indian devisee is not subject to a charge for indebtedness incurred by the devisee. 25 U.S.C. sec. 348 (1964). Consequently, Hazel Trinder has no interest in the estate that is subject to a charge for attorney's fees awarded pursuant to 25 CFR sec. 15.26. A proper construction of the last sentence of the regulation precludes an award of attorney's fees where the attorney's client has no interest in the restricted estate against which the fee can be charged. The award to Mr. Massman of attorney's fees in the amount of \$7,500 is therefore vacated. If Mr. Massman and his client are unable to agree on a fee, Mr. Massman's rightful claim for compensation from his client, whether based on contract or quantum merit, must be pursued in a state or federal court with appropriate civil jurisdiction. See *Che-man v. Fodder*, 259 F. Supp. 910, 914 (W.D. Okla. 1966).

Having decided that the attorney's fee is not a proper claim against the estate of John Akers the issue of priority of payment is resolved simply by application of the the controlling regulation, sec. 15.25, which is set out above. Both the irrigation claim and the Internal Revenue claim fall within category (3) as unsecured claims of indebtedness to the United States or any of its agencies. The irrigation claim will be paid first from the funds in the Individual Indian Money account and the remainder in the account will be paid toward satisfying the Internal Revenue claim for unpaid income taxes of John and Dolly Akers.

Since the amount of income taxes due Internal Revenue exceeds the funds of the estate in the Individual Indian Money Account the income accruing to the estate is liable for payment until the full amount due is paid. See sec. 15.25(c) set out, p. 405 (italics portion); *Solicitor's Opinion*, 61 I.D. 37 (1952), *Regional Solicitor's Memorandum re Estate of Celeste Red Thunder* (October 12, 1967). Only the income accruing to the restricted estate is available to pay claims against the estate for the land cannot be sold to satisfy such debts since, under 25 U.S.C. sec. 348 (1964), the land is held in trust for the sole use and benefit of the Indian. See also *Memorandum Opinion of Regional Solicitor re Estate of Antoine Bordeau, Jr.*, R.S. No. 7501 (June 9, 1967).

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the Superintendent shall:

A. Distribute all cash funds in the Individual Indian Money account:

1. in payment of the probate fee of \$75; and

2. in payment of the irrigation claim of \$310; and

3. the balance of the fund shall be paid toward satisfaction of the Internal Revenue claim and the Superintendent shall pay any future income accruing to the estate until the debt be satisfied.

B. Deliver to Hazel Trinder, in accordance with the will of John Akers, the trust lands which form the residue of John Akers' estate.

This decision is final for the Department.

DANIEL HARRIS, *Member*.

I CONCUR:

JAMES M. DAY, *Member*.

ANDREW W. MISCOVICH

6 IBLA 100

Decided *May 31, 1972*

Appeal from decision (F-8412) by Chief, Branch of Land Appeals; Office of Appeals and Hearings, affirming rejection of timber sale application.

Reversed and remanded.

Alaska: Generally—Alaska: Sales—Regulations: Generally—Regulations:

Applicability—Timber Sales and Disposals

The Secretary of the Interior is authorized under sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. sec. 615(a) (1970) [formerly 48 U.S.C. sec. 421 (1958)], to promulgate regulations governing small sales of timber in Alaska which provide for competitive bidding. However, where regulations specifically provide for exclusively noncompetitive procedures for such sales, the general timber regulations, based upon 30 U.S.C. sec. 601 (1970) will be deemed not applicable.

Statutory Construction: Generally—Statutory Construction: Implied Repeals—Timber Sales and Disposals

The admission of Alaska into the Union did not repeal the statutes particularly applicable to that state, not related to its former territorial government. Therefore sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. sec. 615(a) [formerly 48 U.S.C. sec. 421 (1958)] is still in effect, despite the existence of the general timber authorization contained in 30 U.S.C. sec. 601 (1970). The latter Act is deemed to be inapplicable to small sales of timber in Alaska since its authority is limited to situations where the disposition of the timber “* * * is not otherwise expressly authorized by law.”

APPEARANCES: James R. Blair, Esq. of Rice, Hoppner, Blair & McShea, for the appellant.

OPINION BY MR. FISHMAN INTERIOR BOARD OF LAND APPEALS

Andrew M. Miscovich has appealed to the Secretary of the Interior from a decision dated August 26, 1969, by the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land

Management, which affirmed a decision¹ dated April 29, 1969, rendered by Fairbanks land office rejecting his timber sale application,² F-8412.

The Office of Appeals and Hearings affirmed the land office decision on the basis that, although there is a separate portion of the regulations, 43 CFR Subpart 5409 (1969), specifically applicable to Alaska, all timber sales in Alaska are also governed by the general timber sale laws (*e.g.* 30 U.S.C. secs. 601-603 (1970)) and regulations (*e.g.* 43 CFR 5411.1 (1969)³ and 5421.1 (1969).⁴ The decision also adverted to sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. sec. 615a

¹ The decision recited in pertinent portion as follows:

"After careful consideration, I have decided that we must reject your timber sale application F-8412.

"The regulations provide that generally timber to be offered for sale requires competitive bids.

"All sales other than those specified in 5421.1—Negotiated Sales—shall be made only after inviting competitive bids through publication and posting. (43 CFR 5411.1, Competitive sales)."

"Negotiated sales are possible, however, under certain conditions but only if in the public interest.

"When it is determined by the authorized officer to be in the public interest, he may sell at not less than the appraised value, without advertising or calling for bids, timber where the contract is for the sale of less than 250 M bd ft. (43 CFR 5421.1-a)."

"Because of the many applications we have received for timber sales along the winter road, it is clearly not in the public interest to negotiate the sale of timber. I feel the public interest requires that we advertise any timber sold in this area, as long as the demand remains."

² The appellant had applied to purchase 250,000 bd. ft.

³ Now substantially embodied in 43 CFR 5401.0-6 (1972).

⁴ Now substantially embodied in 43 CFR 5402.0-6 (1972).

(1970)⁵ which authorizes "[t]he Secretary of the Interior, under such rules and regulations as he may prescribe, * * * [to] cause to be appraised the timber * * * upon public lands in Alaska and [he] may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof * * * And such sales shall at all times be limited to actual necessities for consumption in Alaska from year to year * * *."

The decision of the Office of Appeals and Hearings also stated:

Authority for the disposal of timber or other forest products on public lands in Alaska was further authorized and supplemented by the terms of the Act of July 31, 1947, as amended, 30 U.S.C. 601, *et seq.*

In view of the broad language of these laws which granted discretion to the Secretary or his delegate to dispose of the timber, the narrow limitation placed on the timber sale regulations by the appellant is without merit, and there was no abuse of discretion by the local Bureau officials in denying the appellant's application for a negotiated timber sale. The decision of the Fairbanks office is therefore affirmed.

The first issue to be resolved is whether the general timber regulations affect timber sales in Alaska * * * "where quantities are such as will be disposed of from year to year, and the purchases are made by those who do not contemplate large-scale production and an expenditure of large sums of money for developing enterprises for the exportation of such timber." 43 CFR 5409.2-1

⁵ Formerly 48 U.S.C. § 421 (1958).

(1969), now substantially embodied in 43 CFR 5490.2-1 (1972).

In the light of the broad discretion vested in the Secretary by sec. 11 of the Act of May 14, 1898, *as amended*, it is crystal clear that he had authority to prescribe regulations providing for competitive sales of small amounts of timber in Alaska. But did he do so?

The reliance below on 30 U.S.C. sec. 601 (1970) is inapposite since that law specifically limits its operation to disposals of timber " * * * not otherwise expressly authorized by law * * *."

The admission of Alaska into the Union as a state did not vitiate the statutes particularly applicable to that state, not related to territorial government. See *Solicitor's Opinion*, M-36551 (February 4, 1959). Therefore, we hold that sec. 11 of the Act of May 14, 1898, *as amended*, is still in force and effect.

There is nothing in the general timber regulations to impel the conclusion that they were intended to be applicable to a timber sale application such as the one in issue. On the contrary, both 43 CFR 5421.1 (1969), relating to negotiated sales and granting discretionary authority to sell competitively, and 43 CFR 5411.1 (1969), reciting in part that all sales other than those specified in 43 CFR 5421.1⁶ (1969)

⁶ It is noteworthy that this section spells out only the criteria for negotiated sales contained in 30 U.S.C. § 602 (1970), except for

"(b) Timber on the right-of-way of a logging road and danger trees adjacent to the right-of-way on O&C lands may be sold at not less than the appraised value without advertising or calling for bids to (1) permittee who constructs a road pursuant to a permit issued

" * * * shall be made only after inviting competitive bids * * *", invoke as authority 30 U.S.C. sec. 601 (1970), but not sec. 11 of the Act of May 14, 1898, *as amended*.

Indeed, 43 CFR 5400.0-3(a) (3) (1969)⁷ and 43 CFR 5400.0-3(b) (1) (1969)⁸ specifically recognize the nonapplicability of the general regulations to small timber sales in Alaska:

(3) The sale of timber in Alaska will be made under pertinent statutes and the applicable regulation (Part 5490); however, sales of more than a two-year supply of timber for domestic use in Alaska may be authorized under the act of July 31, 1947⁹ (61 Stat. 681), as amended.

(b) *Alaska sales*. (1) Authority for small sales of timber for use in Alaska. Section 5490.1 is issued under authority of sec. 11, 30 Stat. 414, as amended; 48 U.S.C. 421. Section 5490.1 is contained in Circular 1901, 20 F.R. 1216, Feb. 26, 1955; 26 F.R. 5006, June 6, 1961.

These regulations also demonstrate that 30 U.S.C. sec. 601 (1970) has no applicability where an existing law *i.e.*, sec. 11 of the Act of May 14, 1898, *as amended*, is operable.

The initial denial of the application was predicated on the erroneous assumption that the timber could be offered for sale competitively and that " * * * it is clearly not in the public interest to negotiate the sale of timber. I feel the public interest requires that we ad-

under Subpart 2234 of this chapter, or (2) a contractor who is constructing a road with Government funds."

⁷ The same provisions appears in the 1972 edition of 43 CFR.

⁸ See n. 7.

⁹ Found in 30 U.S.C. § 601 (1970).

June 13, 1972

vertise any timber sale in this area, so long as the demand remains." In essence, the reasons for rejection were without recognition of the applicable regulations,¹⁰ 43 CFR, Subpart 5409 (1969).

We hold that the Secretary of the Interior is authorized under sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. sec. 615(a) (1970) [formerly 48 U.S.C. sec. 421 (1958)], to promulgate regulations governing small sales of timber in Alaska which provide for competitive bidding. However, since existing regulations specifically provide exclusively noncompetitive procedures for such sales, the general timber regulations, based upon 30 U.S.C. sec. 601 (1970) are not applicable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and remanded for reconsideration of the application.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member*.

DOUGLAS E. HENRIQUES, *Member*.

¹⁰ Obviously this decision recognizes that sales of more than a two-year supply of timber for use in Alaska may be made under 30 U.S.C. § 601 (1970), and that the Secretary may promulgate regulations under sec. 11 of the Act of May 14, 1898, *as amended*, to provide for competitive sales of all timber. The Secretary could have made the general timber regulations applicable to small timber sales in Alaska.

CONSOLIDATION COAL COMPANY, INC.

1 IBMA 131

Decided June 13, 1972

Appeal by Consolidation Coal Company, Inc. from an order of Alfred P. Whittaker, Departmental Hearing Examiner, dismissing as untimely filed Consolidation's application for review of an order of withdrawal (MORG 72-74).

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Timeliness of Filing

The 30-day time limit prescribed by section 105(a) of the Act for filing applications for review is a limitation on the Secretary's jurisdiction. An application received more than thirty days after receipt of an order sought to be reviewed is not timely filed within the meaning of the Act and the Regulations.

APPEARANCES: James P. Hemphill, Esq., for appellant, Consolidation Coal Company, Inc.; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Bernard M. Bordenick and I. Avrum Fingeret, Trial Attorneys, for appellee, U.S. Bureau of Mines.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

On January 5, 1972, an imminent danger withdrawal order was issued by the Bureau of Mines (Bureau) to Consolidation Coal Company, Inc.'s (Consol) Blacksville No. 1 Mine. Consol sought review of this

order of withdrawal through section 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "Act")¹ by filing an application for review. The application was sent by first-class, certified mail from Pittsburgh, Pennsylvania. The envelope in which it was contained was postmarked February 4, 1972. The application and the envelope in which it was mailed were officially stamped as received and filed with the Office of Hearings and Appeals on February 7, 1972.²

The Bureau and representative of miners, the United Mine Workers of America, both filed answers to Consol's application, and by the examiner's amended order of March 17, 1972, the matter was scheduled for a hearing on May 11, 1972. On April 5, 1972, the Bureau filed a motion to dismiss, alleging for the first time that Consol's application was filed beyond the 30-day period prescribed in section 105(a) of the Act.³ On April 17,

1972, the examiner granted the Bureau's motion and dismissed the application.

Consol filed a timely notice of appeal to the examiner's order and subsequently filed a brief containing three arguments: (1) the application was in fact and law filed within the 30-day period; (2) the examiner erred in treating the time limit as jurisdictional; and (3) the Bureau waived any objection to late filing by its delay in raising the issue.

On June 8, 1972, the Bureau filed a brief arguing: (1) the application was not timely filed in that under the Rules of the Board an application is not timely filed unless it is received within thirty days of receipt of the order; and (2) the examiner's ruling that he had no jurisdiction over the case was correct.

ISSUE ON APPEAL

Can an examiner properly take jurisdiction over the merits of an application for review filed pursuant to section 105(a) of the Act, if such application was filed more than 30 days after receipts of the order sought to be reviewed?

DISCUSSION OF ISSUE

In *Freeman Coal Mining Corporation*, decided October 5, 1970, we held that the 30-day time limit in section 105(a) is jurisdictional,

within 30 days of receipt of any modification or termination of an order where review is sought of the modification or termination." * * * 43 CFR 4.530(c).

¹ 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Section 4.22(a) of the General Rules for the Office of Hearings and Appeals states:

"*Filing of documents.* A document is filed in the Office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it."

³ Section 105(a)(1) states *inter alia*:

"An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order *within thirty days of receipt thereof or within thirty days of its modification or termination.*" * * * (Italics added.)

The Board's Rules state *inter alia*:

"An application for review shall be filed within 30 days of receipt by the applicant of the order * * * sought to be reviewed or

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in that it " * * * constitutes a statutory limitation on our authority to review such an application * * *." *Freeman Coal Mining Corp.*, 1 IBMA 1, 21, 77 I.D. 149, 161 (1970). Therefore, unless Consol can show that it had filed its application by February 4, 1972, which was its thirtieth day, its right to have the order reviewed under section 105 (a) is "irretrievably lost."⁴ See *United Drug Co., et al. v. Helvering*, 108 F.2d 637, 638-39 (2d Cir. 1940).

The only evidence in the record as to the date the application was actually received is the date stamped on the application and envelope by the Office of Hearings and Appeals. In the absence of evidence showing the contrary, the stamped date establishes that the application was received and filed February 7, 1972. See 43 CFR 4.22 (a), 4.508(a), 4.530(c). This was too late for it to be timely filed, and in these circumstances, the Examiner had no jurisdiction to consider the application on its merits. Therefore, we AFFIRM the Examiner's order dismissing the application.⁵

We cannot agree with the contentions presented in Consol's brief. The first argument, that the application was in fact and law timely filed, is not supported by evidence,

but rests on the assertion that the application *may* have been received by February 4.⁶ The cases cited in the brief lend no support to Consol's lack of evidence, for in every case, there was evidence which permitted the court to find that the subject pleading was received within the proper time.⁷ Secondly, Consol would not be aided by any presumptions of proper mailing, e.g. *Central Paper Co. v. Commissioner of Internal Revenue*, 199 F.2d 902 (6th Cir. 1952), for it is unreasonable to infer that an application mailed by certified mail from Pittsburgh, Pennsylvania, and clearly postmarked February 4, 1972, would arrive at our offices on the same day. Neither is Consol aided by our rule favoring liberal and fair construction of the Regulations, 43 CFR 4.505(b). Although it is possible to broadly construe what may constitute filing, *see* note 7, *infra*, a liberal construction cannot supply facts to show receipt and filing in any form by February 4.

Consol's second argument is essentially that the 30-day time limit need not be construed as jurisdictional. We have previously held it to be so in *Freeman Coal Mining*

⁶ It is noted that since the application was sent by certified mail, Consol is in the best position to show by its return receipt when the application was physically received. Nonetheless, Consol has not chosen to come forth with this evidence.

⁴ Consol may always challenge in penalty proceedings brought under section 109 whether the conditions or practices cited in the order constitute a violation. 43 CFR 4.530(d).

⁵ It is, of course, within the power of the Examiner to raise questions of jurisdiction *sua sponte*, but his failure to do so herein is not a ground for reversal.

⁷ In several of the cases the question was whether deposit of a pleading in a court's or board's post office box constituted receipt for the purposes of filing. This question is not relevant in this case since neither the Board nor the Office of Hearings and Appeals has a post office box, and both receive mail only at their offices by regular postal delivery.

Corp., supra. Consol has not convinced us that our decision in *Free-man* was in error. The general rule is that statutorily prescribed time limitations are jurisdictional. *United Drug Co. v. Helvering, supra* at 638. The principal case relied upon by Consol to show the contrary, *Christgau v. Fine*, 233 Minn. 452, 27 N.W. 2d 193 (1947), appears to be limited to the peculiar character of the Minnesota employment security law in 1946. Following amendment of that law in 1951, the statutory time for appeal was subsequently held to be jurisdictional. *Vavoulis v. 1965 & 1966 Contrib. Rate of Electronic Development Co.*, 282 Minn. 318, 164 N.W. 2d 378 (1969). Assuming *arguendo* the correctness of the *Christgau* rationale, it would be necessary to establish that Congress intended that the Secretary of the Interior accept applications for review of orders of withdrawal on their merits more than 30 days after receipt of such orders. We do not find such intent, and Consol has submitted nothing to show that such was the intent. *See generally* 43 CFR 4.22 (f) (1).

Consol's third argument—that the Bureau has waived its right to object to the late filing—we also find to be without merit. A question of jurisdiction is not subject to waiver. *Alexander v. Special School District of Bonneville, Logan County, Ark.*, 132 F.2d 355, 358 (8th Cir. 1943); *Lamb, et al. v. Shasta Oil Co., et al.*, 149 F.2d 729 (5th Cir. 1945); *Tinkoff v. West*

Publishing Co., et al., 138 F.2d 607 (7th Cir. 1943). This question may be raised at any time in a proceeding. The cases cited by Consol in support of its contention that the Bureau waived its right to object are not in point in that none of them involves jurisdictional matters.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of Interior, 211 DM 13.6, 35 F.R. 12081, IT IS ORDERED that the order of the Examiner issued April 17, 1972, IS HEREBY AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

DUNCAN MILLER

6 IBLA 216

Decided June 22, 1972

Appeal from the decision of the New Mexico land office requiring lease offeror to consent to certain special stipulations imposed by the Forest Service as a condition to the issuance of an oil and gas lease on public lands within a national forest. (N.M. 0556030).

Reversed.

Oil and Gas Leases: Generally—Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Consent of Agency

Although statute requires the consent of the agency administering the surface

of *acquired* federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to the issuance of the lease, where an oil and gas lease offer is made for available *public* lands which have been withdrawn the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest.

OVERRULED: The following Departmental decisions are hereby overruled:

Mountain Fuel Supply Company, A-31053 (December 19, 1969); *Cecil H. Phillips*, A-30851 (November 16, 1967); *J. D. Archer*, A-30750 (May 31, 1967); *Duncan Miller*, A-30722 (April 14, 1967); *Duncan Miller*, A-30742 (December 2, 1966); *Halvor F. Holbeck*, A-30376 (December 2, 1965); *H. E. Skillander*, A-30279 (January 26, 1965); *Jacob N. Wasserman*, A-30275 (September 22, 1964); *Duncan Miller*, A-29760 (September 18, 1963).

APPEARANCES: Duncan Miller, *pro se*.

**OPINION BY MR. STUEBING
INTERIOR BOARD OF LAND
APPEALS**

Duncan Miller has appealed from a land office decision which required his consent to certain special stipu-

lations imposed by the Forest Service, United States Department of Agriculture, before a noncompetitive oil and gas lease would be issued to him for public lands within the Santa Fe National Forest, New Mexico.

Our review of the matter discloses that in addition to the eleven standard stipulations routinely required for leases of lands subject to the surface jurisdiction of the Department of Agriculture (Form 3103-2, October 1964), the Regional Forester, Southwestern Region (Region 3), imposed twenty-four special, or supplemental stipulations as a precondition to his approval of the Bureau of Land Management's issuance of the lease.

The special stipulations would forbid the lessee from exercising the rights nominally conferred by the lease unless and until he applied for and received from the Forest Supervisor special land use permits specifically authorizing that particular activity. Summaries of the prohibitions, by stipulation number, are as follows:

1. No surface use of the land for any purpose.
2. No geophysical work involving core holes or shot holes.
5. No drill sites will be authorized within $\frac{1}{2}$ mile of present or proposed recreation areas, administrative sites, residences, lodges or camps, except by approval of the Regional Forester.
6. No drill sites will be authorized within $\frac{1}{4}$ mile of any permanent water, including springs, stock

tanks and wildlife water catchments.

7. No improvement of any existing road.

8. No road relocation work.

15. No drill site to exceed one acre. Specifications provided for pods, pits, equipment removal and restoration.

16. No more than one tank battery to each noncontiguous section. None on game migration routes.

The affirmative obligations imposed upon the lessee by the proposed special stipulations are as stringent as the negative obligations enumerated above. The Regional Forester will decide if it is necessary for wells to be drilled only in accordance with a unit plan approved by the Director, Geological Survey (Stip. #3). After receiving a special land use permit from the Forester to conduct some specific activity on the leasehold, the lessee must give the Forester 10 days advance notice prior to the initiation of the authorized activity (Stip. #4). Pipelines away from the drill pad must be buried at least 12 inches, except in the discretion of the Forest Supervisor (Stip. #10). Surplus water will be disposed of, or used by the forest officer at his discretion (Stip. #11). Lessee's water wells become the property of the United States upon abandonment, and the casing therein will be left in place. During lessee's operations, whenever possible, water will be supplied from lessee's wells for livestock and wildlife and any other use authorized by the Forest Serv-

ice (Stip. #12). The lessee may be required to locate pumps underground whenever deemed necessary by the Forest Supervisor for aesthetic or other purposes (Stip. #19). The lessee must remove the drilling rig after well completion and within 30 days after notice by the Forest Supervisor (Stip. #20). Lessee must deliver to the Forest Service a surety bond in the amount of \$10,000 with sureties satisfactory to the Forest Service to guarantee performance of these stipulations and the requirements of the special land use permits in conjunction therewith (Stip. #23).

Some of these special stipulations appear to be extremely arbitrary. For example, where the leasehold is a section or its equivalent, any water located near the center would preclude drilling, as would a building or recreation site. Also, section 2(a) of the lease terms provides for the filing of a \$10,000 drilling bond to insure compliance with the lessee's obligations. This is supposed to protect the interests of the United States, and it is difficult to understand why the Forest Service requires an additional \$10,000 bond to protect its interests as though it were a separate entity.

Aside from the lessee's quandry in such cases, there is the critical question of the basic authority of the Secretary of the Interior to issue and administer oil and gas leases on public domain lands. The stipulations are so stringent as to be nugatory of the lease itself, in that the lessee could not exercise the basic rights afforded by the lease until he

June 22, 1972

applied for and was granted a series of special land use permits at the discretion of the Forest Supervisor. The issuance of a lease under such conditions would constitute little more than an expression of the consent of the Secretary of the Interior to seek to explore for and recover oil and gas at the pleasure and discretion of the Forest Service, subject to such terms and conditions as it may impose. This may be regarded as an abnegation of the authority of this Department or a usurpation of that authority by the Forest Service.

The Forest Service informed the Bureau of Land Management that the purpose of the supplemental stipulations is to provide essential protection and to permit administration of the renewable surface resources under the Multiple Use Act of June 12, 1960 (74 Stat. 215; 16 U.S.C. sec. 528 (1970)).¹ It further advised that the supplemental stipulations spell out the requirements of the standard stipulations and put the lessee on notice that he will be required to operate his lease under an acceptable surface management plan. The Forest Service, stating that it had fully considered the stipulations, advised that they had been in use for a number of years and have had widespread acceptance. However, it is our understanding that these stipulations are only required in Forest Service Region 3.

¹ This Act, incidentally, contains a proviso that, "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands * * *."

The additional special stipulations requested by the Forest Service have not been drafted with any particular regard to the lands included in the appellant's lease offer. They are not addressed to any specific need. Had they been tailored to meet a need to protect or preserve identifiable resource values on the land involved they doubtless would have been accorded favorable consideration. This Board has repeatedly affirmed decisions to impose reasonably necessary special stipulations of this ilk. *Bob Owen White, et al.*, 5 IBLA 229 (March 22, 1972); *Benjamin T. Franklin, et al.*, 4 IBLA 130 (November 30, 1971); *Quantex Corp., et al.*, 4 IBLA 31, 78 I.D. 317 (1971).

But where, as here, rigid restraints and controls would be imposed on oil and gas lessees generally, regardless of a specific need therefor in any particular case, in the apparent hope that they might have a salutary effect in some instances unknown to their draftsman, or for the purpose of investing Forest Service field officers with extraordinary authority to regulate lessee's activities, which they would not otherwise have, we must regard such stipulations as arbitrary.

On August 7, 1969, Solicitor Melich of this Department, in commenting to the Chairman of the Public Land Law Review Commission on the *Oil and Gas Study* prepared under the auspices of the Commission, stated:

* * * the reference to the Department's frequently refusing to lease lands in na-

tional forests when the Forest Service objects is too sweeping. The Department requires that valid reasons must be submitted. These are weighed in determining whether to lease or not to lease in the public interest.

The standard stipulations of Form 3103-2 are intended to afford appropriate general protection to the timber, wildlife, vegetative and other resources of national forests. If they do not accomplish this they should be revised. Instead, the eleven standard stipulations are supplemented by twenty-four additional special stipulations, which in turn will be supplemented by the additional terms, conditions and stipulations of the several special land use permits which the lessee must obtain before he can exercise the rights nominally bestowed by the lease. This would operate to negate the control over the lease terms which is exercised by this Department and invest that control in field officers of the Forest Service.

There is a significant difference in the language of the Mineral Leasing Act (for public domain lands) and the Mineral Leasing Act for Acquired Lands, in that the latter expressly provides that no mineral deposit on *acquired* lands may be leased by the Secretary except with the consent of the head of the executive department or agency having jurisdiction over the land, and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired. 30 U.S.C. sec. 352 (1970). (Also to the same

effect see 43 CFR 3109.3-1 (1972).) This Board has recognized this obligation even where it has appeared to the Board that the special stipulations requested by the administering agency were unreasonable. *Duncan Miller*, 5 IBLA 364 (April 19, 1972).

Had it been the legislative or regulatory intent to similarly restrain the Secretary in the exercise of his authority to grant mineral leases and permits on *public* lands withdrawn or reserved it could easily have been so stated. The fact that it has not is significant.²

In the transfer of certain functions from the Secretary of the Interior, section 2(c) of the Act of June 11, 1960; 74 Stat. 206, reads:

Nothing in subsection (1) of section 1 hereof shall be construed to authorize the Secretary of Agriculture to dispose of coal, phosphate, sodium, potassium, oil, oil shale, gas, or sulfur, or to dispose of any minerals which would be subject to disposal under the mining laws if such laws were applicable to the lands in which the minerals are situated.

The Secretary of the Interior is the official designated by statute to issue leases or permits for the exploration, development and utilization of mineral deposits in public lands under general rules and regulations to be prescribed by him. 30 U.S.C. sec. 189 (1970).

² This is borne out by the fact that an exception to this general rule is afforded by statute with regard to public-domain lands within the exterior boundaries of national forests in Minnesota, where the development and utilization of mineral resources can be permitted by the Secretary of the Interior only with the consent of the Secretary of Agriculture. Act of June 30, 1950, 64 Stat. 311; 16 U.S.C. § 508b (1970).

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The Bureau of Land Management is the Interior agency which exercises the delegated authority of the Secretary for this purpose. The following regulations in Title 43 CFR (1972 ed.) are applicable:

§ 3109.4 Reserved, withdrawn, or segregated lands.

§ 3109.4-1 Requirements.

With respect to lands embraced in a reservation or segregated for any particular purpose the lessee shall conduct operations in conformity with such requirements as may be made by the Bureau of Land Management for the protection and use of the land for the purpose for which it was reserved or segregated, *so far as may be consistent with the use of the land for the purpose of the lease, which latter shall be regarded as the dominant use unless otherwise provided or separately stipulated.* (Italics added.)

§ 3109.4-2 Special stipulations.

Offerors for noncompetitive oil and gas leases and applicants for permits, leases, and licenses for lands, the surface control of which is under the jurisdiction of the Department of Agriculture, *will be required to consent to the inclusion therein of the stipulation on a form approved by the Director.* Where the lands have been withdrawn for reclamation purposes the offeror or applicant will be required to consent to the inclusion of a stipulation on the approved forms. If the land is potentially irrigable, or if the land is within the flow limits of a reservoir site or within the drainage area of a constructed reservoir, or if withdrawn for power purposes, or where the lands have been withdrawn as Game Range Lands, Coordination Lands, or Alaska Wildlife Areas, *the offeror or applicant will be required to consent to the inclusion of a stipulation on an approved form.* Additional conditions may be imposed to protect the land withdrawn if deemed neces-

sary by the agency having jurisdiction over the surface. (Italics added.)

In this instance the standard stipulations appear to conform to the regulation in that they are on a form approved by the Director, but the special stipulations have not been so approved.

These regulations raise the question of whether the form of the stipulation itself is subject to the Director's approval or whether he must accept the stipulation and require the offeror's consent to it on a form devised or approved by him. While the language employed may be construed to indicate that it is the format of the paper on which the stipulations are written that must be approved by the Director, this interpretation is inconsistent with the exercise of the delegated authority of the Secretary to prescribe the terms and conditions which will govern a mineral lease.

In dealing with this appeal we have encountered a substantial body of contrary departmental case law. It has been the consistent policy of the Department not to question the merits of terms and requirements imposed by other agencies as conditions precedent to their agreement to lease the public land withdrawn for their use. Interior decisions have held that the propriety or meaning of any special stipulation should be taken up with that agency by the offeror, and that the burden is on him to persuade the administering agency to modify its stipulations. Unless the Forest Service (or other agency) agreed

to modify, the Department has required consent to them as a condition to issuance of the lease. *Mountain Fuel Supply Company*, A-31053 (December 19, 1969); *Cecil H. Phillips*, A-30851 (November 16, 1967); *J. D. Archer*, A-30750 (May 31, 1967); *Duncan Miller*, A-30722 (April 14, 1967); *Duncan Miller*, A-30742 (December 2, 1966); *Halvor F. Holbeck*, A-30376 (December 2, 1965); *H. E. Shillander*, A-30279 (January 26, 1965); *Jacob N. Wasserman*, A-30275 (September 22, 1964); *Duncan Miller*, A-29760 (September 18, 1963). In light of our conclusion that these decisions do not correctly reflect the applicable law or the regulations, they are overruled. These cases are distinguished from the decision of this Board in *Quantex Corporation, et al.*, 4 IBLA 31; 78 I.D. 317 (1971), in that in *Quantex* the Board *did* undertake to review the special stipulations proposed by the Forest Service and, having considered them on their merits, found that the stipulations were not unreasonable, thereby discharging this Department's responsibility to determine the propriety of the stipulations in the light of the circumstances.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the New Mexico land office is reversed and the case is remanded to that office to ascertain whether the Forest

Service has a specific need for any special stipulation(s) in addition to the standard stipulations approved by the Director on Form 3103-2. Should additional stipulations be proposed they will be considered in accordance with the criteria set forth herein.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

NEWTON FRISHBERG, *Chairman*.

DOUGLAS E. HENRIQUES, *Member*.

ESTATE OF BASIL BLACKBURN

1 IBIA 261

Decided June 26, 1972

Petition for reopening filed by the Bureau of Indian Affairs (Superintendent of the Wind River Reservation) to correct an error in a probate order entered February 21, 1961.

Denied.

100.0 Indian Probate: Generally

A determination of the heirs of a deceased Indian is controlling only as to the estate of the decedent, and it does not have collateral application in the determination of the heirs of decedent's relatives.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

An estate will not be reopened in the exercise of the Secretary's discretion to waive the time limitations where the interests remaining in the estate which could be acquired by an omitted heir are insubstantial.

*June 26, 1972***375.1 Indian Probate: Reopening:
Waiver of Time Limitation**

It is in the public interest to issue decisions which remove uncertainties or possible clouds from titles to interests in Indian allotments.

*OPINION BY MR. McKEE
INTERIOR BOARD OF
INDIAN APPEALS*

Basil Blackburn died intestate January 7, 1960, and his heirs were determined by an order entered by the Hearing Examiner (Indian Probate) on February 21, 1961, at Billings, Montana. He was survived by his widow, six children, and a grandson, Stanley Duane Brown, who had been adopted by strangers. Stanley is the child of a predeceased son, Michael Blackburn. The distribution of the estate was one-half to the widow, a $\frac{1}{14}$ interest each to the six surviving children, and a $\frac{1}{14}$ interest to the grandson. The decedent was unallotted, but at his death, he held inherited minor fractional interests in eight different allotments on the Wind River Reservation in Wyoming.

Prior to the distribution of his estate, the fractional interests of the heirs in three allotments were sold in August and September of 1960 to another Indian to whom fee patents were issued. These interests thereby passed out of trust beyond the control of the United States and of the Secretary.

Thereafter, subsequent to the distribution of this estate, the beneficial interests of the heirs in three

additional allotments were sold to the Shoshone and Arapahoe tribes of the Wind River Reservation. This sale, in two phases, was consummated in March of 1966 and title remained in the United States in trust for the tribes.

Stanley Duane Brown's share of the proceeds from all sales was \$61.83.

In the fee patents the United States reserved "an undivided $\frac{1}{2}$ interest in all of the oil, gas, and other minerals" in trust for the owners, their heirs and assigns. The United States reserved from the lands sold to the tribe "* * * a life estate in all the minerals * * *" in trust, for the owners of the interests transferred.

The decedent's interests in the two allotments which remain unsold were a $\frac{7}{3240}$ interest in the allotment of Turtle Looking Round, No. 1320, valued in the inventory of decedent's estate at \$7.50, and a $\frac{1}{16}$ interest in the allotment of Sophia Dewey, No. 231c, valued in the inventory at \$125.

On March 6, 1972, Clyde W. Hobbs, Superintendent of the Wind River Agency, filed a petition for the reopening of this probate with the Examiner in Billings, Montana. Attached to the petition were copies of records from the Wind River Agency and the tribal court at the agency by which it appeared there had been omitted from among the heirs entitled to distribution of the decedent's estate, one Leroy Ambrose W. Bull, a second natural son

of Michael Blackburn, the predeceased son of this decedent.

From the records attached to the Superintendent's petition, it appeared that said Leroy Ambrose W. Bull (formerly Leroy Blackburn) was a full brother of Stanley Duane Brown, both being the sons of Michael Blackburn and Jenny Lonedog. They had been separately adopted at different dates by different people.

If granted on the basis of the record as it appears before this Board, a reopening of the proceedings in this decedent's estate would lead to the establishment of Leroy Ambrose W. Bull as an heir entitled to a 1/28 interest in the estate, reducing the share of Stanley Duane Brown from a 1/14 to a 1/28.

As a result, Leroy W. Bull would have been entitled during his lifetime to \$30.91 as a distributive share of the sale proceeds derived from the six interests sold prior to the filing of the petition for reopening, and he would have held an interest in the minerals reserved in the fee patents as follows:

Allotment of Adella Blackburn, No. 1151-----	77/60480
Allotment of Painted Wolf, No. 1152-----	1/3456
Allotment of George Blackburn, No. 1153-----	1/576

He would have held in the remaining unsold interests a 1/28 of 7/3240 interest in the allotment of Turtle Looking Round No. 1320, and a 1/28 of a 1/16 interest in the allotment of Sophia Dewey, No. 231c. On the basis of the estimated values of these interests shown on

the inventory, the interest of Leroy can be computed at 27 cents and \$4.48 respectively.

The petition for reopening was transmitted to the Board by the Examiner in Billings, Montana, by a memorandum dated March 30, 1972, in which he recommended reopening. He also indicated he had been notified that Leroy Ambrose Blackburn had died October 24, 1971. The death of Leroy Blackburn terminated the mineral interest reserved "for life" in the transfers to the tribes. His probable heirs appear to be his widow and two minor children. The hearing in probate of his estate will be part of the next hearing calendar scheduled at the Wind River Reservation.

The Superintendent is charged with the management of the land and with the record keeping as to land ownership of the various allotments on the Wind River Reservation. He is confronted in this case with the possibility of adverse claims being filed, clouding and disturbing titles which have been considered by the Government and by the individuals involved to have been established for substantial periods of time.

The provisions of 43 CFR 4.242 (a) bar reopening by an examiner after a probate has been closed for more than three years. However, the Secretary in 25 CFR 1.2 has reserved authority in his discretion to make exception to the three-year limitation on reopening to prevent "manifest injustice" resulting from mistake, fraud, or misrepresentation.

June 29, 1972

A finding is made on the basis of the record that the interests which have been heretofore denied to Leroy W. Bull (nee Blackburn) are insubstantial. Consequently the Secretary is in no position to disturb the conveyances to the tribes or to attempt to obtain a court decree canceling the fee patents.

A further finding is made that titles to the lands must be settled and stabilized and that the Secretary should not exercise discretion to reopen the estate to allow the heirs of Leroy W. Bull a share in the minimal interests remaining in the estate. No manifest injustice to him or his heirs is found in the circumstances of this case, and it is in the public interest to remove this uncertainty concerning the title by issuance of a final decision. The principles announced by the Assistant Secretary of the Interior in his decision in *Jean Holton Westfeldt*, A-29604 (November 15, 1963), are applicable here. It was said,

The determination as to whether to sell or lease public land pursuant to the Small Tract Act (the Act of June 1, 1938) as amended, 43 U.S.C. 682a (1970 ed.) is by statute committed to the discretion of the Secretary. If he, or his delegate, decides that it is not in the public interest to dispose of land under the act he may refuse to do so. *Joseph M. Schuck et al.*, A-28603 (August 16, 1961). * * *

A further finding is made that the refusal to exercise discretion to reopen this probate should not be taken as a determination of the ultimate rights of Leroy W. Bull or his heirs to share in the estates of

any other blood relatives under the statutes of descent. His rights in the estate of this decedent were determined February 21, 1961. The order determining heirs and this decision of the Board are limited to this estate only.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the petition for reopening filed herein by the Superintendent of the Wind River Agency is hereby DENIED.

This decision is final for the Department.

DAVID J. MCKEE, *Chairman.*

I CONCUR:

JAMES M. DAY, *Member.*

LUCAS COAL COMPANY

1 IBMA 138

Decided June 29, 1972

Appeal by the Bureau of Mines from an order of Departmental Hearing Examiner William Fauver vacating an imminent danger order of withdrawal in Docket No. PITT 72-46.

Remanded.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Decisions—Administrative Procedure: Decisions

Section 8(b) of the Administrative Procedure Act requires findings of fact. In the absence of findings it may be impossible for the Board of Mine Operations Appeals to review a decision of an

examiner, and the case should be remanded to the examiner.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

The burden of proof in a proceeding for the review of an imminent danger order of withdrawal is on the applicant.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Stanley M. Schwartz, Trial Attorney, for appellant, Bureau of Mines; Leo M. Stepanian, Esquire, for appellee, Lucas Coal Company.

**MEMORANDUM OPINION
AND ORDER INTERIOR
BOARD OF MINE OPERA-
TIONS APPEALS**

This case arises from an application for review of an order of withdrawal issued to Lucas Coal Company (Lucas) by a Bureau of Mines' (Bureau) inspector on October 7, 1971, pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act").¹ By oral ruling the examiner vacated the order for the reason that the Bureau had failed to sustain its burden of proof that a condition of "imminent danger" existed.²

The Bureau filed with the Board

a timely notice of appeal to the examiner's decision, and on May 12, 1972, filed its brief. On May 25, 1972, Lucas filed a motion to dismiss the appeal and to strike the Bureau's brief for failing to comply with section 4.601(a) of the Board's Rules,³ which requires specific record citations where an objection is based upon evidence of record. In view of our ruling hereinafter on the merits of the Bureau's appeal, it is unnecessary for us to rule on Lucas' motion to strike the brief which is merely a procedural objection to the form of the Bureau's appeal.⁴

The Bureau's objection to the examiner's ruling is that it was based on an incorrect standard of proof in determining whether the conditions cited in the order constituted "imminent danger" as defined by the Act.⁵ The Bureau contends that the examiner required a showing of *probability* that the condition or practice found by the inspector could cause death or serious physical harm before such condition or practice could be abated; whereas, the proper standard is that there be a showing of *reasonable expectation* that such consequences would occur. Therefore, it is argued, a higher degree of evidentiary cer-

¹ 83 Stat. 742-804, 30 U.S.C. secs. 801-960 (1970).

² The oral ruling was made initially on January 4, 1972. The transcript of the ruling was clarified by Order Clarifying Transcript, issued April 6, 1972. There is no significant difference between the two rulings insofar as this decision is concerned.

³ 43 CFR 4.601(a).

⁴ No representative of miners has appeared in this case.

⁵ Section 3(j) of the Act states: "* * * '(I)mminent danger' means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

June 29, 1972

tainty was required by the examiner than intended by the Congress.

We believe that the Bureau misunderstood the examiner's ruling which stated in pertinent part:

I am not satisfied from the preponderance of the evidence * * * that the Government has made out a case that there is *a reasonable probability or expectation* that the conditions found * * * did constitute an imminent danger within the meaning of that section. (Italics added) *

It appears to us that the examiner did not impose any different degree of expectation than required by the Act. We read the examiner's decision as using "probability" as synonymous with "reasonable expectation." Therefore, the degree of certainty remains reasonable expectation. This appears to be nothing more than a futile exercise in semantics.

Although we believe that the examiner correctly stated the standard of evidentiary certainty required to prove imminent danger, we are unable to determine from the record whether he correctly applied the standard, since he did not make the findings of fact required by section 8(b) of the Administrative Procedure Act. 5 U.S.C. sec. 557(c) (A) (1970). It may well be that the examiner had adduced sufficient evidence to support his ruling; but in the absence of findings, it is im-

possible for us to review the decision adequately.

We are further troubled with the procedure followed by the examiner with respect to the proposed findings of fact. It appears that the parties were given an opportunity to submit proposed findings and conclusions, but only after the examiner ruled on the case. Although, in fact, the parties submitted no proposed finding, they were effectively denied their right to do so, since section 8(b) of the Administrative Procedure Act clearly states, *inter alia*, that the parties are entitled to an opportunity to submit proposed findings *before* a recommended, initial, or tentative decision.

We also believe the examiner erred in the assignment of the burden of proof. Section 4.587 of the Rules, in effect at the time of the hearing and examiner's decision, stated that in all proceedings under the Act, the applicant, petitioner, or party initiating the proceeding shall have the burden of proof " * * * except that the Bureau shall have the burden of proving violation of any mandatory health or safety standard * * * *wherever violation * * * is in issue.*" 43 CFR 4.587 (1972) (italics added).⁷ Lucas, as the applicant in this case, has the burden of proof of showing that imminent danger did

*This is the language of the ruling as it appears in both the original transcript and the revision of April 6, 1972.

⁷ A recent amendment to Rule 4.587 would not change the applicant's burden of proof. 43 CFR 4.587, 37 F.R. 11462.

not exist. The examiner reasoned that because the question of imminent danger was "inextricably interwoven" with the question of violation, the Bureau had the burden of proof of imminent danger. We disagree with this reasoning. While violations of the mandatory standards may constitute conditions or practices upon which an imminent danger order may be based, proof of violation is not necessarily an element of proof of imminent danger. A determination can be made that the conditions and practices cited in an order of withdrawal constitute imminent danger without deciding whether such conditions and practices also constitute violations of mandatory health or safety standards, *i.e.* the question of violation may be immaterial or irrelevant to the issue of imminent danger. Therefore, we hold that the examiner erred in concluding that the burden of proof of imminent danger was on the Bureau.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the case IS REMANDED to the examiner with instructions to prepare a new decision incorporating therein appropriate findings of fact and conclusions of law consistent with the views expressed in this opinion.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

ESTATE OF BENJAMIN HARRISON STOWHY

(DECEASED YAKIMA ALLOTTEE
NO. 2455)

and

ESTATE OF MARY G. GUINEY HARRISON

(DECEASED COLVILLE ALLOTTEE
NO. S-925)

1 IBIA 269

Decided *June 30, 1972*

Petition for rehearing challenging constitutionality of an amendment to Yakima Enrollment Act certified to Director, Office of Hearings and Appeals for exercise of Director's supervisory authority by Hearing Examiner Richard J. Montgomery.

Petition denied: Order Approving Will of Mary G. Guiney Harrison reversed and remanded on other grounds.

100.0 Indian Probate: Generally

The Department of the Interior does not have the authority to declare a federal statute unconstitutional.

APPEARANCES: C. James Lust, Esq. (Hanson and Lust) for petitioners.

OPINION BY MR. DAY INTERIOR BOARD OF INDIAN APPEALS

This matter arose by reason of a petition for reconsideration, filed pursuant to 43 CFR 4.241, in the Estate of Benjamin Harrison Stowhy. As the sole issue raised was a challenge to the constitutionality of a federal statute, Hearing Examiner

YAKIMA ALLOTTEE NO. 2455) AND ESTATE OF MARY G. GUINEY HARRISON
(DECEASED COLVILLE ALLOTTEE NO. S-925)

June 30, 1972

Richard J. Montgomery certified the petition to the Director, Office of Hearings and Appeals, with a request that he exercise his delegated supervisory authority.¹ The Estate of Mary G. Guiney Harrison was also certified to the Director because of factors that will be made evident later in this decision.

Benjamin Harrison Stowhy, an enrolled Yakima Indian, died on March 8, 1968, without leaving natural issue, father, mother, brother, sister or issue thereof. At the time of his death, he was possessed of four allotments located within the Yakima Reservation with an appraised value of \$136,400 and cash in his Yakima Agency IIM account totaling \$2,508.22. By a will executed on January 15, 1951, he devised his entire estate to his wife, Mary G. Guiney Galler Carroll Alexson Stowhy Harrison, an enrolled Colville Indian. Mary died on December 2, 1968, possessed of a 1/96 share of an allotment on the Colville Reservation valued at \$8, cash in her Colville Agency IIM account totaling \$250, and an allotment located within the Yakima Reservation with an appraised value of \$11,500. Mary's Yakima allotment is one-half of the original allotment of Benjamin's mother, Cecelia Stowhy; less five acres deeded by Mary to Esther S. Monjarez, the adopted daughter of Benjamin and Mary, on Septem-

ber 8, 1968.² By a will executed on March 29, 1968, Mary devised the bulk of her estate to Martina Guiney Grey, an enrolled Colville Indian and a daughter by a previous marriage to Cornelius Guiney (deceased non-Indian).

On April 11, 1972, Examiner Montgomery issued orders approving both wills and declared Martina to be the sole beneficiary of Mary's estate, which also included Benjamin's entire estate. The examiner erred in the reading of Mary's will. A reading thereof discloses a devise of two acres out of the allotment of Cecelia Stowhy to a second daughter, Margaret McDonald (Martina's sister).

In addition, the examiner found that by virtue of Public Law 91-627, the "Yakima Indian trust estate is subject to the option of the Yakima Indian Tribe, within 2 years from the date of this order, to purchase this Yakima Indian trust property from the above devisee. * * *

The petitioners, who allege to be "enrolled members of the Yakima tribes of one-fourth or more blood of the Yakima tribe" and distant relatives of Benjamin,³ charge that

¹ Esther Stowhy Monjarez is Mary's granddaughter and the daughter of Margaret Guiney S. McDonald. Esther has filed a separate petition for rehearing which is not part of this matter.

² The petitioners are the heirs of Hannah S. Yallup (¼), deceased, Maggie E. Goheen (¼), Charles P. Eyle (¼), Frank Eyle (¼), Elijah Lewis (¼), Marguerite Guineys S. McDonald, Lila June Sanders Broxon, Elsie Sam (¼), John T. Eyle (¼), Evans Lewis (¼), Edger

³ See 43 CFR 4.5 (211 DM 13.1; 35 F.R. 12081).

Public law 91-627, enacted on December 31, 1970, "applies retrospectively and denies the petitioners due process under the Fifth Amendment of the U.S. constitution." The legislation at issue is quite unique. To understand its effect on the parties it is necessary that we review its history. Prior to Public Law 91-627, section 7 of the Act of August 9, 1946, read:

After August 9, 1946, only enrolled members of the Yakima Tribes of one-fourth or more blood of such tribes shall take by inheritance or by will any interest in that part of the restricted or trust estate of a deceased member of such tribes which came to the decedent through his membership in such tribes or which consists of any interest in or the rents, issues, or profits from an allotment of land within the Yakima Reservation or within the area ceded by the treaty of June 9, 1855 (12 Stat. 951) * * *. 60 Stat. 968, 25 U.S.C. § 607 (1958).

The Act of August 9, 1946, has been interpreted to bar a prospective heir or devisee with less than one-quarter Yakima blood from in-

heriting Yakima lands, *Estate of Hattie Lindsey*, IA-1158 (May 2, 1966). When a person is disqualified by the Act of August 9, 1946, he is regarded as having predeceased his ancestor and the inheritance is passed upon the decedent's next of kin who are otherwise qualified. *Solicitor's Opinion*, M-36331 (March 16, 1956).

Public Law 91-627, 84 Stat. 1874, amended section 7 of the Act of August 9, 1946, by substituting the following:

(a) A person who is not an enrolled member of the Yakima Tribes with one-fourth degree or more blood of such tribes shall not be entitled to receive by devise or inheritance any interest in trust or restricted land within the Yakima Reservation or within the area ceded by the Treaty of June 9, 1855 (12 Stat. 951), if, while the decedent's estate is pending before the Examiner of Inheritance, the Yakima Tribes pay to the Secretary of the Interior, on behalf of such person, the fair market value of such interest as determined by the Secretary of the Interior after appraisal. The interest for which payment is made shall be held by the Secretary in Trust for the Yakima Tribes.

(b) On request of the Yakima Tribes the Examiner of Inheritance shall keep an estate pending for not less than two years from the date of decedent's death.

* * * * *

Section 2 of Public Law 91-627 is unusual, in that it provides:

The provisions of section 7 of the Act of August 9, 1946, as amended by this Act, shall apply to all estates *pending before the Examiner of Inheritance* [1] *on the date of this Act* [December 31,

* The title of Examiner of Inheritance has been changed to Hearing Examiner.

Lewis ($\frac{1}{8}$) and Ernest Lewis ($\frac{1}{8}$). The record is not precise as to the petitioner's relationship to Benjamin. The fractions shown in parentheses indicate the degree of Yakima blood as reported by the Yakima Indian Agency.

Marguerite Guineys S. McDonald and Lila June Sanders Broxon are reported to be enrolled at the Colville Indian Agency. It is probable that Marguerite is the same person as Mary's daughter, Margaret. If so, it is questionable why she is named as a petitioner. To add to the confusion, the record contains a power of attorney to Pat Cockrill, Esq., signed by Marguerite. The record contains testimony that Lila is the daughter of Esther Smith Sanders (deceased) an adopted daughter of Mary and Cornelius Guiney.

The petition for rehearing was filed in the Estate of Benjamin Harrison Showly only and makes no reference to the Estate of Mary C. Guiney Harrison.

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1970], and to all future estates, but shall not apply to any estate heretofore closed. (*Italics added.*)

Although the petitioners have not alleged the taking of specific property without due process of law, it is apparent they contend that at the time of Benjamin's death, they were his next of kin and the only heirs entitled to inherit his Yakima trust or restricted land.⁵ Their contention appears to be based on the horn-book principle that real property vests in the heirs or devisees upon the death of the owner. 31 Am Jur 2d, Executors and Administrators, § 246. Therefore, it is contended that the passage of Public Law 91-627 divested the petitioners of their inherited estate which was vested on March 8, 1968, the date of Benjamin's death.

I find that the petitioners have raised a serious constitutional challenge. However, the Department is without authority to declare the legislation unconstitutional. Only the courts have the authority to take action which runs counter to the expressed will of Congress. 3 Davis, Administrative Law Treatise, § 20.04; *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958).

Notwithstanding the Department's inability to entertain a challenge to the constitutionality of an act of Congress, the examiner acted correctly in certifying the issue to

the Director. It is the policy of the Department of the Interior to expedite the exhaustion of a petitioner's administrative remedy whenever the petitioner, in good faith, raises a serious issue as to the constitutionality of an act the Department is charged with administering, so that he may pursue the proper relief in the courts. Such a policy not only affords prompt relief to the petitioners, but assists departmental officials in properly meeting their responsibilities.

Therefore, pursuant to the authority delegated to the Director, Office of Hearings and Appeals, by the Secretary of the Interior, 211 DM 13.1; 35 F.R. 12081, it is ordered:

1. The petition for rehearing is denied. This decision is final for the Department, but shall not be executed prior to the expiration of 60 days from the date hereof.

2. The examiner's order approving will of Mary G. Guiney Harrison is reversed and remanded for actions consistent with this decision and the estate is hereby ordered reopened.

3. It is ordered that the petitions filed by Esther Stowhy Monjarez and Louis Joseph M. Ives be returned to the examiner for action pursuant to 43 CFR 4.241.

4. It is ordered that this decision shall be executed and distributed by the examiner pursuant to 43 CFR 4.296.

⁵ Mary, Martina, Margaret and Esther are Colville enrollees and do not have the requisite one-fourth Yakima blood.

JAMES M. DAY, *Director.*

MERITT N. BARTON

6 IBLA 293

Decided July 7, 1972

Appeal from decision (W-4336) of Wyoming land office, Bureau of Land Management, rejecting mineral patent application and declaring mining claims null and void *ab initio*.

Set aside and remanded.

Hearings—Mineral Lands: Determination of Character of—Mining Claims: Determination of Validity—Mining Claims: Hearings—Multiple Mineral Development Act: Hearings

Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. sec. 181 *et seq.* (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void *ad initio* for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. sec. 521 (1970).

Mining Claims: Determination of Validity—Mining Claims: Patent

Section 2332, Rev. Stat., 30 U.S.C. sec. 38 (1970), does not obviate the necessity of a mining claimant to show a valid discovery in order to be entitled to a patent for a mining claim.

Mining Claims: Determination of Validity—Mining Claims: Lands Subject to—Mining Claims: Relocation—Multiple Mineral Development Act: Generally

Section 2332, Rev. Stat., 30 U.S.C. sec. 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States.

APPEARANCES: Otis Reynolds, Reynolds and Hughes, attorney for Meritt N. Barton.

OPINION BY MRS.
THOMPSON

INTERIOR BOARD OF LAND APPEALS

Meritt N. Barton has appealed to the Director, Bureau of Land Management,¹ from a decision by the Bureau's Wyoming land office dated November 24, 1969, rejecting his application for mineral patent for nine

¹The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Cir. 2273, 35 F.R. 10009, 10012.

placer mining claims² embracing portions of secs. 22, 27, and 34, T. 49 N., R. 66 W., 6th P.M., Crook County, Wyoming, and declaring such claims null and void *ab initio*. The land office decision was based solely on the ground that the claims, which were located in 1945 and 1952 for bentonite,³ are situated on lands which were known to be valuable for oil and gas at the times of location, and that the record showed that appellant had failed to comply with the provisions of the Act of August 12, 1953, 30 U.S.C. sec. 501 (1970), and the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. sec. 521 (1970).

The statutes referred to require that, in order to have validated any mining claim located subsequent to July 31, 1939, and prior to January 1, 1953, covering lands which at the time of location were included in a permit or lease, or an applica-

tion for a permit or lease, for leasing act minerals, or which were known to be valuable for such minerals, the owner of the claim must have filed not later than 120 days subsequent to August 12, 1953, an amended notice of location, which notice must have specified that it was filed pursuant to the Act of August 12, 1953, and for the purpose of obtaining the benefits set forth in that Act.⁴

The validity of the claims in question has been the subject of protracted litigation. Appellant filed his first application for patent on

⁴ In determinations construing the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 181 *et seq.* (1970), the Department held that that Act had segregated from appropriation under the mining laws lands which were included in a permit or lease, or application for permit or lease, for leasable minerals, or were known to be valuable for such minerals. Any purported locations on such lands made after the effective date of the Act were regarded as void *ab initio*, since a tract of public land could not simultaneously be subject to both a permit or lease and a valid mining claim, and the mining laws contained no authority for issuance of patent with a reservation of leasable minerals. See *Arthur L. Rankin*, 73 I.D. 305, 309 (1966); *United States v. U.S. Borax Co.*, 58 I.D. 426, 432 (1943); *Secretary's Letter*, 50 L.D. 650 (1924); *Joseph E. McClory, et al.*, 50 L.D. 623 (1924).

The purpose of the Act of August 12, 1953, and Multiple Mineral Development Act of August 13, 1954, was to provide for the concurrent exploitation of all mineral resources, both patentable and leasable, in the public lands. To this end, the Acts prescribed a procedure for validation of existing mining claims located subsequent to July 31, 1939, and prior to February 10, 1954, which were previously considered invalid because of conflict with the Mineral Leasing Act. The 1954 Act also authorizes the location of future claims on lands covered by a mineral permit or lease, or application therefor, or which are known to be valuable for leasable minerals. A patent for such claims must contain a reservation of leasable minerals to the United States. 30 U.S.C. §§ 502, 524 (1970).

² Meritt N. Barton has been the owner of record of the claims since 1960, but states that he holds the title to fractional interests therein in trust for the following persons: Caroline Barton; Nelda Barton; Verne F. Barton; Verne F. Barton, Jr.; Billie Lee Barton; Elaine Barton; Otis Reynolds; Mary Lou Barton; George L. Barton; Jessie M. Barton; Merle Nefsy; Bronna L. Rohde, formerly Bronna L. Nefsy; Claire C. McGuckin; James T. McGuckin, Jr.; Imogene C. Thomas; and Marjorie May Bertagnoli. Appellant owns a fractional interest in all of the claims except one, the Billie No. 2.

Although the other persons listed above were named as contestees in previous proceedings relating to these claims, the land office decision of November 24, 1969, named only Meritt N. Barton, and the current appeal is prosecuted solely in his name.

³ The claims in question are the Black Draw Nos. 1 and 2, and Barton Nos. 1 and 2, located July 20, 1945; the Billie Nos. 1, 2, and 3, located May 15, 1952; and the Nefsy Nos. 1 and 2, located July 18, 1945.

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February 2, 1960. On October 22, 1962, the Bureau of Land Management instituted a contest against the claims, alleging in substance that the lands included therein were non-mineral in character, and that no discovery of a valuable mineral deposit had been made. Appellant answered, denying the charges. A supplemental complaint issued March 13, 1963. Subsequent to issuance of the complaint, the land office ascertained that oil and gas leases had been issued for portions of the lands comprising the claims after the claims had been located, and by a decision of August 27, 1963 directed the claimant to file a private contest against the leaseholders, pursuant to section 7 of the Multiple Mineral Development Act, 30 U.S.C. sec. 527 (1970). Appellant complied with the Bureau's directive. Upon the failure of any of the lessees to file an answer to the complaint, the mining claimant's rights were affirmed and the private contest was dismissed by the land office in a decision dated July 21, 1965.

On January 3, 1966, Barton withdrew his initial application for patent, reserving the right to reapply, and the land office, in a decision dated January 11, 1966, accepted the withdrawal and dismissed the Government's contest without a hearing and without prejudice.

Appellant filed a second application for patent of the claims, January 30, 1967, supplemented on February 20, 1967. On March 10, 1967, the Bureau issued a new contest complaint, alleging that "[n]o dis-

covery of a valuable mineral sufficient to support a mining location has been made upon or within the limits of said claims." At a hearing on the contest held on June 25, 1968, the hearing examiner declined to allow the Government to elicit testimony from appellant as to the dates when any purported discovery on the claims had been made. The Government then moved to amend the complaint to allege that if a discovery had been made it was made subsequent to August 13, 1954, the date of enactment of the Multiple Mineral Development Act. The hearing examiner denied the motion to amend, and in a decision dated August 13, 1968, dismissed the contest with prejudice.

Upon appeal by the Government, the Office of Appeals and Hearings, Bureau of Land Management, by decision of August 6, 1969, reversed the hearing examiner's decision and remanded the case to the Bureau's State Director for Wyoming "for the amendment of the complaint or the filing of a new complaint with charges appropriate to raise the issues intended * * *." The decision pointed out that, contrary to the finding of the hearing examiner, the date of discovery on the claims was an important factor in any determination of their validity. Instead of proceeding with the contest, the Wyoming land office declared the claims null and void *ab initio*.

In concluding that the lands were known to be valuable for minerals leasable under the Mineral Leasing Act at the time the claims were lo-

cated, the land office indicated that although there were no permits or leases or applications or offers therefor at that time, at various times prior and subsequent to the location of the claims, portions of all of the lands with the mining claims were included in permits or leases or applications or offers for such permits or leases under the Mineral Leasing Act. It stated that the lands have been classified as known to be valuable for minerals subject to the mineral leasing laws as follows:

Upon further consideration of previous classifications, the Director of the United States Geological Survey, on October 25, 1968, determined on the basis of published evidence that the subject lands were known to be valuable for oil and gas and oil impregnated rocks as early as 1920 and that the lands involved in the subject application were known to be valuable for oil and gas and asphaltic minerals, but not other leasing act minerals, on January 1, 1945, and from that time to the present during which time location of the captioned mining claims was attempted. Further, the Director of the United States Geological Survey stated that, "Subsequent oil and gas developments on these and adjacent lands to date confirm the determination that these lands are known to be valuable for oil and gas, notwithstanding the presence of shallow dry holes drilled in the S ½ of Section 34, T. 49 N., R. 66 W."

Appellant does not assert that amended locations of the claims were filed in accordance with the Acts of August 12, 1953, and August 13, 1954. Instead, he contends that the record fails to show that the claims come within the purview of those Acts so as to necessitate such filings. Appellant cites the

history of these claims and contends basically that the case should be sent back for a hearing as provided in the Bureau's decision of August 6, 1969.

We agree that there must be a hearing in this matter.

The situation here is different from other cases where claims may appropriately be declared null and void *ab initio* without a hearing because the records of this Department conclusively show that land is not subject to appropriation under the mining laws, such as where the land has been classified under the Recreation and Public Purposes Act, 43 U.S.C. sec. 869 (1970), *Buch v. Morton*, 449 F. 2d 600 (9th Cir. 1971); or the Small Tract Act, 43 U.S.C. sec. 682a (1970), *Dredge Corporation v. Penny*, 362 F. 2d 889 (9th Cir. 1966); or is otherwise withdrawn from mineral entry. *Wesley Laubscher*, 4 IBLA 246 (January 12, 1972). If the facts upon which the determination of invalidity is based are not apparent on the face of the record and are subject to dispute, mining claims cannot be declared invalid without a hearing to resolve the factual issues. *Id.*; *Mr. and Mrs. Ted R. Wagner*, 69 I.D. 186 (1962); *John D. Archer, Stephen D. Smoot*, 67 I.D. 181 (1960).

The determination by the Geological Survey that the land was known to be valuable for oil and gas was not made until October 25, 1968, and, indeed, was a change from prior communications from that office to the Bureau on that matter. At the time the claims were located

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there were no permits or leases for oil and gas or applications therefor which would have been ascertainable from the status records of the land office.⁵ Also, there is no indication that the land was then within any petroleum reserve area or had otherwise been classified as valuable for oil and gas or withdrawn for such minerals in a manner which would have been reflected on the land office status records. Even where lands have been formally classified or withdrawn for minerals subject to the Mineral Leasing Act and this is reflected on land office status records, mineral locators have been permitted a hearing to dispute such a classification, or determination of the known character of the land. *Solicitor's Opinion*, 63 I.D. 346 (1956). A hearing, therefore, is required here to determine if the land was known to be valuable for minerals subject to the mineral leasing laws when the claims were located to determine the necessity for appellant's compliance with the Acts cited above, and other consequences indicated in the Bureau's Office of Appeals and Hearings' decision of August 6, 1969, and below.

We believe that the appropriate procedure in this instance is the issuance of a new contest complaint.

⁵ Where there were such permits or leases or applications and no showing of compliance with the Act of August 12, 1953, or the Multiple Mineral Development Act of 1954, mining claims would then be invalid and no hearing would be necessary. *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957). But see the discussion, *infra* concerning a holding of the claim for the state's statute of limitations after the Multiple Mineral Development Act.

In the interest of disposing of this long-standing case finally, when this case is returned to the Bureau for issuance of a new complaint, all matters going to the validity of the mining claims should be considered. At a hearing, evidence relating to all the disputed facts, including the known value of the land for Mineral Leasing Act minerals, should be presented. *Cf. Long Beach Salt Company*, 6 IBLA 50 (May 17, 1972).

There is one issue raised by appellant which needs clarification now. Appellant contends that in the event of a further hearing, evidence would be presented that he and his predecessors have held the claims for a period equal to the time prescribed by the statute of limitations for mining claims prescribed by the State of Wyoming. Therefore, he asserts, he is entitled to a patent pursuant to 30 U.S.C. sec. 38 (1970). This provision codifies Rev. Stat. sec. 2332, and provides that where any persons have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory in which they are situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under the mining laws of the United States. In *Cole, et al. v. Ralph*, 252 U.S. 286, 307 (1920), the Supreme Court held that this section did not obviate the necessity for a mining claimant to make a discovery of a valuable mineral deposit in order to be en-

titled to a patent from the United States. Its purpose was only to obviate the need for proof of the posting, etc. of a location notice. Therefore, even if the claimant shows compliance with this section, there must still be a demonstration that there is a valid discovery on each claim within the meaning of the mining laws to warrant issuance of a patent. See also, *Fresh v. Udall*, 228 F. Supp. 738, 743 (D. Colo. 1964); *Harry A. Schultz, et al.*, 61 I.D. 259, 263 (1953); *Susie E. Cochran, et al. v. Effie V. Bonebrake, et al.*, 57 I.D. 105 (1940).

The status of the land is important in applying Rev. Stat. § 2332. It is clear that if land is not open to entry under the mining laws, no rights in a mining claim may be created against the United States by Rev. Stat. § 2332 as that provision necessarily assumes that lands are open to mineral entry and patent. *Chanslor-Canfield Midway Oil Co., et al. v. United States*, 266 F. 145, 151 (9th Cir. 1920); *United States v. Midway Northern Oil Co., et al.*, 232 F. 619 (S.D. Cal. 1916). Thus, a location deficient because made when the lands were not open to mineral location cannot be cured, even though there was a discovery, so long as the land is not subject to mineral location. If the land becomes open to entry under the mining laws, however, Rev. Stat. § 2332 may serve as a substitute for making a new location when the land becomes open, if the lands are held for the requisite number of years there-

after, and there are no intervening rights, assuming of course, that a discovery of a valuable mineral deposit is then shown. *Harry A. Schultz, et al., supra.*

The Multiple Mineral Development Act has now, in effect, opened to location under the mining laws, lands known to be valuable for leasable minerals, or on which there is a mineral permit or lease or application therefor, subject to a reservation of the leasable minerals to the United States. See n. 4, *supra*. Therefore, mining claims held for the requisite time after the date of that Act may be validated by Rev. Stat. § 2332, assuming, of course, the claims are otherwise locatable for minerals still subject to the mining laws, and a discovery of a valuable mineral deposit has been made. The leasable minerals would be reserved to the United States, however. This possibility should be considered in the further proceedings in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside and the case is remanded to the Bureau for further action consistent with this decision.

JOAN B. THOMPSON, *Member.*

We concur:

EDWARD W. STUEBING, *Member.*

JOSEPH W. GOSS, *Member.*

July 12, 1972

ESTATES OF KATE BITNER AND RAE BITNER

1 IBIA 277

Decided July 12, 1972

Petition for reopening filed by the Bureau of Indian Affairs [Area Director, Billings] to obtain correction of an error in a probate order issued October 21, 1913.

Denied.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

No manifest injustice sufficient to justify exercise of the Secretary's discretion for the correction of an error committed 58 years ago is found where the share of which the heir or devisee was deprived is insubstantial, and the benefits to his successors would be now further reduced by fractionation of the original share.

100.0 Indian Probate: Generally

A determination of the heirs of a deceased Indian is controlling only as to the estate of the decedent, and the findings in each case must be supported by a preponderance of the evidence.

OPINION BY MR. McKEE

INTERIOR BOARD OF INDIAN APPEALS

Two estates were decided by a combined order determining heirs of each decedent issued by the Assistant Secretary of the Interior on October 21, 1913. The decedent, Kate Bitner, the mother, died December 29, 1911, and Rae Bitner, the child, died at the age of 6 years in 1902. Both had been allotted on the Wind River Reservation in Wyo-

ming. This matter is before the Board upon a petition for reopening filed April 18, 1972, by the Bureau of Indian Affairs acting through the Area Director at Billings, Montana.

From the facts stated and the material furnished, it would appear that Abner Bitner died in September of 1904, leaving plural wives among his surviving heirs: Kate, one of the decedents herein, and Constance, not here involved. He had children by both wives; with Kate he had a daughter, Odelia, who survived him and a son, Rae, who predeceased him, and with Constance he had Matilda, a daughter who survived him. However, in the determinations made in the order of October 21, 1913, Matilda was determined to be the daughter of Kate and therefore a full sister to Rae, whereas Odelia was determined to be the daughter of Constance, and a half sister to Rae. Distribution was made in accordance with these findings.

It is presumed *arguendo* that if this case were to be reopened, the evidence supporting the allegations in the petition would be admissible at the rehearing and would sustain the allegations made in the petition overcoming the very substantial evidence before the Assistant Secretary when he made his findings 58 years ago.

The computations furnished by the Bureau indicate that if the determinations had been correctly made as between Matilda and Odelia the distribution of the interests to Matilda as a "half sister"

in the 120-acre allotment of Rae Bitner (No. C157) would have been 82/1105, thereof instead of the aggregate interest which she did receive as a "sister [of Rae] and daughter of deceased mother [Kate]" i.e., 38369/225420. Conversely, Odelia should have had the larger interest.

A similar $\frac{1}{6}$ difference in the distribution of the 86.28-acre allotment of Kate Bitner (No. C152) would follow. Under the 1913 findings, Odelia received no interest in this allotment. It is noted that the record does not include any immediate prospect or probability of sale to reduce these interests to cash capable of distribution to the owners.

There is no indication that any heir has sold any interest in either allotment. It does appear that Matilda died in 1914 and that Odelia died in 1960. Odelia's heirs are her three children who inherited equally, while Matilda's successors are ten individuals who hold unequal shares.

A petition for reopening was transmitted to this Board by Examiner Hammett in Billings, Montana, by his memorandum of April 13, 1972, in which he withheld any recommendation for reopening on the ground that the interests which were improperly allocated as a result of the error are so small that no manifest injustice could be found.

It is set forth in the *Estate of Basil Blackburn*, 1 IBIA 261, 79 I.D. 420 (1972).

The Superintendent is charged with the

management of the land and with the record keeping as to land ownership of the various allotments on the Wind River Reservation. He is confronted in this case with the possibility of adverse claims being filed, clouding and disturbing titles which have been considered by the Government and by the individuals involved to have been established for substantial periods of time.

When first submitting this case to the examiner, the Area Realty Officer said in his memorandum of February 28, 1972:

Without a legal opinion or decision by your office, we don't know which probate inventories require modifications to fill in gaps in the title chains and establish the current ownership of these allotments. The question is, should not the apparent confusion of Odelia and Matilda and their relationship to Rae and Kate be corrected? Or is the decision in probate file 15150-13 irrevocable and final, requiring modifications of subsequent probate inventories that will perpetuate this error?

The Area Director in his petition for reopening filed with the Board on March 24, 1972, included the following statement:

The apparent error was flagged at some time in the past on the agency A and E card. The recent records audit, directed by the Superintendent, resulted in referral of the question to Mr. Hammett [the Examiner].

Whether the interests are large or small, we cannot in good conscience request or prepare modifications of inventories that ignore and perpetuate an apparent error where the Government as trustee has the power to correct its error.

Therefore, we are asking that you consider this memorandum as a petition for reopening the estates of Rae and Kate Bitner to correct the error that was first acknowledged in 1915. (See enclosed partial copy of the probate file of Abner Bitner, 281-C150,

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88933-15, who was the father of both Matilda and Odelia.)

By 43 CFR 4.242(a) the examiner is barred from reopening probate which has been closed more than three years, but by 25 CFR 1.2 the Secretary has reserved discretionary authority to himself to reopen such cases. This discretionary authority has been delegated to this Board. 43 CFR 4.242(h).

A finding is made that on the basis of the record, the interests which were improperly given to Matilda Bitner and withheld from Odelia Bitner are insubstantial and no manifest injustice arises from the error alleged. As in *Blackburn, supra*, a further finding is made that titles to lands must be settled and stabilized, and that the Secretary should not exercise his discretion in the circumstances of this case to reopen a probate closed for more than 58 years. The exercise of the Secretary's discretion in not reopening is consistent with the public interest in that the issuance of this decision removes ownership uncertainties and stabilizes the title to the land. The principles announced by the Assistant Secretary of the Interior in his decision in *Jean Holton Westfeldt*, A-29604 (November 15, 1963), are as applicable here as they were in *Blackburn, supra*. The Assistant Secretary said in that decision:

The determination as to whether to sell or lease public land pursuant to the Small Tract Act [the Act of June 1, 1938, as amended, 43 U.S.C. 632a 1970 ed.] is by statute committed to the dis-

cretion of the Secretary. If he, or his delegate, decides that it is not in the public interest to dispose of land under the act he may refuse to do so. *Joseph M. Schuck et al.*, A-28603 (August 16, 1961).

A further finding is made that the refusal to exercise discretion to reopen this probate shall not be taken as a determination of the ultimate relationships of the ancestors or the heirs of either Matilda Bitner or Odelia Bitner in any other estate proceeding. The rights determined by the probate order of October 21, 1913, left undisturbed in this decision, are limited to those interests in the estate distributed by that order. Each probate is a separate proceeding and the finding in each must be supported by a preponderance of the evidence.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, 35 F.R. 12081, 43 CFR 4.242 (h), the petition for reopening is hereby DENIED.

This decision is final for the Department.

DAVID J. MCKEE, *Chairman*.

I CONCUR:

JAMES M. DAY, *Member*.

JAMES W. SMITH

6 IBLA 318

Decided July 13, 1972

Appeal from decision by Wyoming land office, Bureau of Land Manage-

ment, rejecting (1) a petition for cancellation of oil and gas lease W-11012, and (2) rejecting application W-24620 for a preference-right oil and gas lease.

Petition for cancellation dismissed. Rejection of application affirmed as modified.

Oil and Gas Leases: Cancellation

Where land included in an existing oil and gas lease is known to contain valuable deposits of oil and gas, the lease may not be canceled administratively by the Department but may be canceled only by judicial proceedings. 30 U.S.C. sec. 184 (1970); 43 CFR 3108.3.

Oil and Gas Lease: Lands Subject To— Oil and Gas Leases: Preference Right Leases

Where an application for a preference-right oil and gas lease is filed for land included in an outstanding oil and gas lease of record, the application must be rejected because the land is segregated by that lease—whether the outstanding lease is valid, void or voidable.

Oil and Gas Leases: Known Geological Structure—Oil and Gas Leases: Can- cellation—Words and Phrases

Dictum: With regard to cancellation of an oil or gas lease, the terms "known geologic structure" and "known to contain valuable deposits of oil or gas" could be distinguished on the basis that the presumptive productivity referred to in the definition of known geologic structure may be a matter of expert opinion, whereas the words "known to contain valuable deposits" connote matters of actual fact. 43 CFR 3100.0-5 and 3108.3.

The Superior Oil Company, A-28897 (September 12, 1962) and William Wostenberg, A-26450 (September 5, 1952) distinguished in dictum.

APPEARANCES: Owen J. Donley, Esq. and Raymond K. Peete, Esq. for appellant James W. Smith.

OPINION BY MR. GOSS

INTERIOR BOARD OF LAND APPEALS

James W. Smith has appealed from a decision of the Cheyenne, Wyoming, land office of the Bureau of Land Management, dated June 26, 1970, which (1) rejected his petition for cancellation of oil and gas lease W-11012 which had been issued to F. H. Mott and assigned to Sierra Trading Corporation and others and (2) rejected appellant's application, W-24620, for issuance to him of a preference-right lease. The land office held that since appellant had acquired the surface title by a patent issued subsequent to the Mineral Leasing Act of February 25, 1920, sec. 20; 30 U.S.C. sec. 229 (1970), he is not eligible to claim the benefits of section 20 of that Act.

It appears from the record that appellant is the current owner of the surface title of the land in the W $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 57 N., R. 97 W., 6th P.M., Wyoming. Appellant obtained a patent for the tract from the United States, March 22, 1965, upon completion of the requirements for a reclamation homestead. The patent contains a reservation of oil and gas to the United States.

Appellant received the patent under settlement rights originally

initiated by his mother, Nancy Cook, whose reclamation homestead entry (Cheyenne 043893) was allowed on February 28, 1919, prior to the enactment of the Mineral Leasing Act. The land office records show that her final proof of compliance with the ordinary homestead laws was accepted December 12, 1925. The entrywoman did not submit final reclamation proof. Appellant stated he acquired her title prior to the entrywoman's death in 1936, however the record contains no reference to any deed or formal assignment document. Appellant also was grantee of a 1941 tax deed. Appellant submitted final reclamation affidavit and acknowledgement of mineral reservation in 1965, and final certificate and patent were then issued.

On June 29, 1954, in a report of the Geological Survey, U.S. Department of the Interior, the land in question was classified as having prospective value for oil and gas. As of March 1, 1968, and prior to appellant's petition herein, the Department issued to F. H. Mott the challenged oil and gas lease W-11012, which included appellant's patented land. According to the record, there is a well (Federal 2-26) in production on the lease.¹ The original lessee subsequently as-

signed his rights under the lease to the Sierra Trading Corporation which now holds the lease jointly with Peter Graf and Harry Rubin.

In his appeal appellant contends that (1) as surface owner of lands included within oil and gas lease W-11012 he is entitled to a preference-right lease for his patented land under 30 U.S.C. sec 229 (1970), and (2) inasmuch as he did not receive a notice of the lease application as required by 43 CFR 3120.4 (1968),² now 43 CFR 3102.2-2 (1972), the existing oil and gas lease is invalid.

The first question for determination³ is whether under any factual circumstances this Board has au-

² 43 CFR 3120.4 (1968) reads:

"Preference right of patentee or entryman to a lease.

"(a) An entryman or patentee who made entry prior to February 25, 1920, or an assignee of such entryman or a vendee of such patentee if the assignment or conveyance was made prior to January 1, 1918, for lands not withdrawn or classified or known to be valuable for oil or gas at date of entry shall be entitled, if the entry or patent is impressed with a reservation of the oil or gas, to a preference right to a lease for the land. A settler whose settlement was made prior to February 25, 1920, on land in the same status but which has since been withdrawn, classified, or is known to contain oil or gas, also has such a preference right.

"(b) Any offeror for a lease to lands owned, entered or settled upon as stated above must notify the person entitled to a preference right of the filing of the offer and of the latter's preference right for 30 days after notice to apply for a lease. If the party entitled to a preference right files a proper offer within the 30-day period, he will be awarded a lease; but if he fails to do so, his rights will be considered to have terminated."

¹ The well is located on appellant's land in the W $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 57 N., R. 97 W., 6th P.M. The tract is communitized with the patented E $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 26, T. 57 N., R. 97 W., 6th P.M., under a communitization agreement of June 1, 1969, designated Com. Agr. NW-307.

³ See *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 445 P. 2d 334, 336 (1968) and authorities cited therein; *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *Morris v. Gilmer*, 129 U.S. 315, 325 (1889).

thority to grant the relief prayed for—i.e., administrative cancellation of the existing lease to permit appellant to assert his own claim to a lease for the oil and gas in his patented land.

Section 31 of the Mineral Leasing Act applies to cancellations based on post-lease events. *Boesche v. Udall*, 373 U.S. 472 (1963). On the other hand section 27, codified as 30 U.S.C. sec. 184 (1970), sets forth one procedure for cancellation and applies to pre-lease as well as post-lease matters. Section 27 provides in part:

Cancellation, forfeiture, or disposal of interests for violation; bona fide purchasers and other valid interests; sale by Secretary; record of proceedings.

(h) (1) If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this chapter,^[4] the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the defendant may be found. (Italics added.)

Under *Boesche v. Udall*, *supra*,⁵

⁴ Chapter 85, 41 Stat. 448, codified as Chapter 3A, 30 U.S. Code. The provision in section 27 that it applies to any violation of Chapter 3A, 30 U.S. Code precludes construing section 27 as limited to such matters as acreage violations.

⁵ In *Boesche v. Udall*, before the Court of Appeals, the appellant for the first time attempted to raise the issue of whether the lease was known to contain valuable deposits of oil and gas. This procedure was opposed by the appellee. Brief for Appellee at 26-27 and Response to Supplemental Memorandum at 17,

it is clear that the Secretary has authority to cancel a lease administratively for invalidity at its inception; the Secretary has, however, interpreted section 27 and limited that authority by promulgating 43 CFR 3108.3⁶ which reads:

Judicial proceedings.

Leases known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the act.

It has long been established that the Secretary is bound by his own regulation so long as it remains in effect. *McKay v. Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955). A regulation promulgated pursuant to the Mineral Leasing Act has the force of law and binds the Secretary as well as others. *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U.S. 621, 629 (1950).

It has been judicially recognized that the valuable deposits regulation should be construed as a limitation upon Departmental cancellation authority. *Pan American Petroleum Corp. v. Pierson*, 181 F. Supp. 557 (D. Wyoming 1960), *rev. on other grounds*, 284 F. 2d 649 (10th Cir. 1960), *cert. den.*, 366 U.S. 936 (1961). In *Pan American* the District Court stated (p. 563):

From what I have said I hold the Supervisor is proceeding in contravention

Boesche v. Udall, 303 F. 2d 204, (D.C. Cir. 1961) *supra*. Neither the Court of Appeals nor the Supreme Court ruled upon the substance of appellant's contentions. Rather, the lease was treated as not containing known valuable deposits.

⁶ 43 CFR 3108.3 (1972), the *valuable deposits limitation*, was formerly numbered 43 CFR 192.161 (1949) and 43 CFR 3129.2(c) (1965).

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of * * * *his own regulation*, and in violation of the terms of the lease when he proceeds administratively to cancel leases on lands known to contain valuable oil and gas deposits. * * * (*Italics added.*)

The Associate Solicitor set forth the current interpretation of the Department⁷ in *Changing Concepts in Federal Oil and Gas Lease Title Security*, 10 ROCKY MOUNTAIN MINERAL LAW INSTITUTE, 339, 357 (1965):

Section 31 of the Mineral Leasing Act expressly limits cancellation by the Secretary where the land covered by the lease is known to contain valuable deposits of oil. It is arguable, however, that this limitation does not apply to cancellation for prelease mistake or fraud be-

⁷ It appears that the Department had previously taken a contrary position. Reference to broad Secretarial powers of cancellation appear in Brief for Respondent, *Boesche v. Udall*, *supra*, and in Response to Supplemental Memorandum (at 5-11), *Boesche v. Udall*, 303 F. 2d 204 (D.C. Cir. 1961)—although without reference to the valuable deposits limitation. In the Supreme Court Brief, the Solicitor General argued (at 27) that the Secretary's authority to cancel for error does not derive from either section 27 or 31, nor does it derive at all from the Mineral Leasing Act. For the purpose of the case now on appeal, it is not necessary to consider this point. When the Secretary promulgated 43 CFR 3108.3, he restricted his cancellation authority.

In *The Superior Oil Company*, *supra*, and *Wm. Wostenberg*, *supra*, the administrative cancellation of a noncompetitive oil and gas lease which had been erroneously issued for lands within the known geologic structure of a producing oil or gas field was upheld on appeal—also without discussion of the valuable deposits limitation. In order to decide the case herein under consideration it is not necessary to determine whether land within the "known geologic structure of a producing oil or gas field" under 43 CFR 3100.0-5 is also "known to contain valuable deposits of oil or gas" under 43 CFR 3108.3. The two terms could be distinguished on the basis that the presumptive productivity referred to in the definition in 43 CFR 3100.0-5 may be a matter of expert opinion, whereas the words "known to contain valuable deposits" in 43 CFR 3108.3 connote matters of actual fact.

cause the statutory prohibition refers only to cancellation for violation of the terms of the lease and has no reference, either directly or indirectly, to cancellation for reasons existing at the time of issuance of the lease. However, by regulation [43 CFR 3129.2(c) (1965), the valuable deposits limitation] the Secretary has interpreted his authority as being limited to lands not known to contain oil or gas. (Footnotes omitted.)

See also Hoffman, *Oil and Gas Leasing on the Public Domain*, 157 (1951) and Stull, *The Authority of the Secretary of the Interior to Cancel Noncompetitive Oil and Gas Leases by Administrative Action*, 5 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 1, 30 (1960).

There is a producing well on the outstanding oil and gas lease herein concerned. As a lease known to contain valuable deposits of oil and gas, the lease is not subject to administrative cancellation but may be canceled only by instituting proceedings in the appropriate United States district court. *Of Pan American Petroleum Corp. v. Pierson*, *supra*; *L. P. Glasebrook, et al.*, A-27332 (August 7, 1956).

Both this Board and the Wyoming land office are thus without authority to cancel the assigned lease, regardless of whether or not cancellation would be proper under the circumstances.

Even if it were not for the bar of 43 CFR 3108.3, appellant has not submitted a case which proves a preference right. In his petition of June 10, 1970, appellant asserts that he received title from his mother not by inheritance but by deed during

her lifetime. Appellant's mother's entry was not allowed until February 28, 1919. Under 30 U.S.C. § 229, construed in 43 CFR 3120.4 (1968), *supra*, an assignee of an entrywoman is entitled to a preference right only if his conveyance was prior to January 1, 1918. *S. N. Hodges, et al. v. Phillips Petroleum Company*, 60 I.D. 184 (1948). *But of. Alexander Fraser and Carl Harvey*, 48 L.D. 237 (1921). An additional question as to appellant's claimed preference right exists in connection with the tax deed which appellant received in 1941, but this question need not be decided at this time.

The rejection of appellant's lease offer by the land office was proper, regardless of whether his preference claim is valid, because of the existing oil and gas lease on the land. Land included in an outstanding oil and gas lease is not available for leasing to others, and an application for such land must be rejected whether or not the outstanding lease was properly issued. *Harold H. Sternberg*, A-30700 (May 25, 1967). So long as an oil and gas lease is outstanding and of record—whether it is valid, void or voidable—it segregates the land. The land is not available until cancellation of the existing lease is noted on the records of the local land office. *Barash v. Seaton*, 256 F. 2d 714 (D.C. Cir. 1958), *Max Barash, The Texas Co.*, 66 I.D. 11 (1959).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior (211 DM 13.5; 35 F.R. 12081), the petition for cancellation of existing lease is dismissed and the decision of the Bureau of Land Management rejecting appellant's application for lease is affirmed as modified.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

NEWTON FRISHBERG, *Chairman*.

FREDERICK FISHMAN, *Member*.

ANNE POINDEXTER LEWIS, *Member*.

EDWARD W. STUEBING, *Member*.

SEPARATE CONCURRENCE BY MRS. THOMPSON

This separate concurrence is offered because I believe erroneous implications may be drawn from the majority opinion as to proper administrative practice in a case of this type. I agree with the afterthought in the majority opinion that appellant has not shown he is entitled to a preference right. I believe, however, that this is the determinative issue raised on appeal and should be resolved more clearly before telling appellant, as the majority has done, that this Department has no authority to grant him relief and, implicitly, that he must seek his relief in the courts. *Cf. Securities and Exchange Commission v. Chenery Corp., et al.*, 332 U.S. 194, 196 (1947). If appellant has no preference right, obviously he has no right to compel cancellation of the existing oil and gas lease

and there is no need to decide whether or not there is authority to cancel a producing oil and gas lease.

In formulating the priority of the issues to be considered, I believe, the majority opinion has put the proverbial cart-before-the-horse. In stating that the first question for determination is whether this Board has authority to cancel the lease, the majority in footnote 3 has cited court cases all dealing with the question of the courts' subject matter jurisdiction. They are not relevant here. What this Board has before it is an appeal from a land office decision rejecting an oil and gas lease preference-right application under section 20 of the Mineral Leasing Act, 30 U.S.C. sec. 229 (1970), and rejecting a petition based upon that preference right to cancel a conflicting existing oil and gas lease.

Obviously this Department has the primary jurisdiction to determine whether an applicant under the Mineral Leasing Act is entitled to an oil and gas lease. The Supreme Court in considering a more difficult question, *i.e.*, whether the Department in administrative proceedings could determine the validity of a mining claim (under the mining laws, 30 U.S.C. sec. 22 *et seq.* (1970)), and declare the claim to be null and void even though it had no power without going to court to eject the claimant, stated that the Department was the proper forum for determining the question and that the Secretary of Interior was entrusted with the duty to regulate

the acquisition of rights in the public lands and the general care of the lands. *Cameron, et al. v. United States*, 252 U.S. 450 (1920). See also, *Best, et al. v. Humboldt Placer Mining Co., et al.*, 371 U.S. 334, 336 (1963), where it was stated this Department "has been granted plenary authority over the administration of public lands, including mining lands." * * *

The Secretary of Interior's general managerial powers over public lands and interests reserved by the United States have been granted by Congress. See 43 U.S.C. sec. 1457 (1970), and 43 U.S.C. sec. 2 (1970), where he is directed to "perform all executive duties * * * in anywise respecting * * * public lands." In R.S. sec. 2478, 43 U.S.C. sec. 1201, he is authorized to "enforce and carry into execution, by appropriate regulations, every part of the provisions of [the Title dealing with public lands] not otherwise specially provided for." The Mineral Leasing Act grants regulatory authority to the Secretary, 30 U.S.C. sec. 226 (1970). This broad authority includes the administration of oil and gas deposits in patented lands which are reserved to the United States and leasable under the Mineral Leasing Act. See *Boesche v. Udall*, 373 U.S. 472 (1963); *cf. Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U.S. 621, 627 (1950).

As this Department has subject matter jurisdiction to determine whether a preference-right oil and gas lease application should be

granted, I believe the land office quite properly first considered whether the applicant was a qualified preference-right applicant before determining whether the existing oil and gas lease must be canceled. This determination of priority comports with the realities of administrative adjudication processes and should not be confused with unrelated court procedures. Without the Department's determining whether an applicant is a qualified preference applicant, he might be forced to go to the courts with the possibility of having the case returned to the Department to first determine his rights before the matter is finally resolved. It is more fair to the applicant to be informed decisively that he does not qualify under the law, rather than on appeal, for this Board *sua sponte*, to rest on the supposed lack of authority to cancel the existing conflicting lease.

Aside from the administrative practicalities and fairness to the applicant in determining the priority of determinations here, I believe there are other difficulties and problems inherent in the majority's reliance on the question of authority to cancel the existing lease. First, this question is premised upon an assumption that if the applicant has a preference right no relief can be afforded by this Department. This premise is based solely upon its interpretation of regulation 43 CFR 3108.3, and its reliance upon the principle that the Secretary's regulations have the force of law and

bind him as well as others, citing *McKay v. Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955), and *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, *supra* at 629.

McKay v. Wahlenmaier is especially relevant here because the court was concerned with this Department's determination of the first qualified applicant under section 17 of the Mineral Leasing Act, 30 U.S.C. sec. 226 (1970). The regulations discussed therein set forth requirements for applicants. The court concluded the Department erroneously failed to cancel an oil and gas lease which had been issued in contravention of a regulation. It went further and said it could have canceled the lease where the application could have been rejected, in any event, because of unfair collusive multiple filings. (226 F. 2d 42, 43.) The court's discussion of the authority to cancel a lease is interesting. It stated at 42:

* * * He [the Secretary] concluded he has authority to cancel an oil and gas lease "for reasons existing at the time of its issuance" which clearly show "that the lease was obtained in contravention of some statutory provision or some regulation issued by the Department,"¹¹ but added, "*Such a reason, is not revealed by the record in this case.*" [Italics by the court.]

Footnote 11 stated:

We think the Secretary unduly restricted his own power of cancellation. He has the right to cancel a lease improvidently issued to a disqualified applicant, to the prejudice of the rights of others, whether or not there is involved a violation of some provision of the statute or of a regulation. This is par-

ticularly true where fraud, deception or concealment caused the lease to be issued.

This discussion by the court indicates the duty the Secretary has to determine the qualified applicant for a lease and to cancel a lease issued to an unqualified applicant.

Let's now turn to the regulation concerning the preference right. 43 CFR 3102.2-2(b) requires that any offeror for a lease to lands for which there might be a preference right.

* * * must notify the person entitled to a preference right of the filing of the offer and of the latter's preference right for 30 days after notice to apply for a lease. If the party entitled to a preference right files a proper offer within the 30-day period, he will be awarded a lease; but if he fails to do so, his rights will be considered to have terminated.

Smith contended that he had never been given notice of the filing of the offer. The majority's determination of authority to cancel the lease must be premised, as indicated, upon the existence of a preference right and, also, upon the lessee's failure to comply with this mandatory notice provision. It has failed to face the dilemma which this poses. If the lease was issued in violation of a regulation, *McKay v. Wahlenmaier*, says the lease must be canceled to award the land to a qualified applicant. If the Secretary is bound by the regulation supposedly limiting the authority to cancel producing oil and gas leases, he is also bound by this regulation imposing a mandatory duty upon an applicant for a lease. Is the Secretary more bound by his own self-limita-

tion of authority than the other regulation? I think not.

If the Secretary has the authority to cancel a producing oil and gas lease for pre-lease defects, as the majority appears to concede, recognizing the Supreme Court's opinion in *Boesche v. Udall*, which clearly upheld such authority in a general way, although a producing lease was not involved, a question is raised as to the propriety of a self-limitation of that power and authority to the derogation of the statutory rights of others. If the regulation is only an interpretation of section 27 of the Mineral Leasing Act, as suggested, the correctness of the interpretation is doubtful. *Boesche v. Udall, supra*. If a regulation does not comport with the law, it need not be followed, and the Secretary may declare it invalid. *Continental Oil Company*, 70 I.D. 473 (1963). For the above reasons and other reasons which need not be discussed, I believe the majority's reliance upon this Department's supposed lack of authority to grant relief here is not well founded and presents more problems and questions than it resolves.

I would rest this decision upon an affirmance of the land office's decision rejecting the preference-right application and petition because the applicant has no preference right.

The only issue to which the appellant's appeal is addressed is the question of whether or not he has a preference right. The land office had concluded that the applicant has no basis for asserting a preference

right to a lease after discussing certain facts of record, and, therefore, it rejected the lease offer and petition for cancellation.¹ Appellant's claim to a preference right stems from section 20 of the Mineral Leasing Act, 30 U.S.C. sec. 229 (1970), which provides in part:

In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery. * * *

With respect to the preference right, appellant has shown that he is the patentee on lands impressed with a mineral reservation. He did not himself, however, make entry on the land prior to the date of the Mineral Leasing Act of February 25, 1920. Homestead entry was made by Nancy Cook, with entry allowed on February 28, 1919. Appellant states that the lands were not classified as being valuable for oil and gas purposes until July 1, 1954, so,

therefore, the land was of the character contemplated by section 20 when entry was made. He states that Nancy Cook was his mother. Her homestead entry final proof was filed on May 12, 1924, and accepted by the Department on December 12, 1925. Appellant asserts that he completed the reclamation proof at a later date, with patent No. 49-65-0037 issued to him on March 22, 1965, with the oil and gas reserved to the United States.

In contending that he has a preference right, appellant cites *S. N. Hodges*, A-25761 (April 20, 1950), as holding that a settler whose settlement was made prior to February 25, 1920, on land open to settlement and not then withdrawn or classified for oil and gas, may be entitled to a preference-right lease under section 20. The *Hodges* decision, however, is no support for his assertion of a preference right as he was not a settler prior to that date. Appellant then states that *Alexander Fraser and Carl Harvey*, 48 L.D. 237 (1921),

* * * appears to hold that although a preference right is not a right which passes by inheritance, when the heir of the entryman completes the entry, he then succeeds to the rights of the entryman and thus becomes the entryman. As a result, he should also receive the preference right.

Appellant contends the facts of his case fit the ruling in that case.

I believe the mere reference to the *Fraser and Harvey*, *supra*, decision by the majority does not answer appellant's contention. *Fraser and Harvey* applied to assignees of des-

¹It pointed out that lease W-11012 was in a producing status. However, this was not given as any reason for the action taken therein. It also indicated the names of the present owners of the lease, but it failed to designate them as adverse parties upon whom service of appeal documents would be required. Where there are such adverse interests in a case of this type, the Bureau offices should designate the holders of the interests as adverse parties so that they will be given notice of all matters in the appeal proceedings and be able to participate therein if they desire. In view of the result reached in this case, however, the holders of the lease have suffered no harm by this failure.

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ert land entryman. It concluded that Congress did not intend by section 20 of the Mineral Leasing Act to limit the right of assignment of desert-land entries or to deprive an assignee under that law of any rights or privileges which the laws conferred upon the original entryman. It is agreed that Congress did not so limit any existing right. However, section 20 created a new right and expressly limited its applicability to assigns of the entryman or patentee where the assignment was made prior to January 1, 1918. Since the *Fraser and Harvey* decision, section 20 has been interpreted as meaning more literally what it says regarding assignments of entries. *S. N. Hodges, et al. v. Phillips Petroleum Co.*, 60 I.D. 184, 188 (1948), stated that section 20 has been consistently interpreted by this Department.

* * * as not applying to those whose rights as patentees or entrymen originated after the enactment of the act (February 25, 1920), or to those whose rights as assignees originated after January 1, 1918. * * *

The regulation 43 CFR 3102.2-2 (1972), in effect at least since the 1949 edition (then numbered, 43 CFR 192.70, also formerly at 43 CFR 3120.4 (1968)), indicates there is a preference right for

An entryman or patentee who made entry prior to February 25, 1920, or an assignee of such entryman or a vendee of such patentee if the assignment or conveyance was made prior to January 1, 1918, * * * A settler whose settlement was made prior to February 25, 1920, * * *.

In a case similar to that presented here, *Martha K. Wilson, George L. Underwood*, Cheyenne 043835, 071818, the Assistant Director, Bureau of Land Management on April 30, 1953, ruled that the section 20 preference right was not applicable where the holder of a reclamation homestead entry acquired the entry through mesne assignment from the original entryman, "since the right extends only to the original entryman or his assigns where the assignment was made prior to January 1, 1918."

It is submitted that the above interpretations of section 20 have, in effect, overruled the *Fraser and Harvey* decision. I believe this decision, therefore, should clearly state that that decision has been overruled, or, in any event, shall not be followed in the circumstances of this case.

It is apparent from the record that appellant acquired his interest in the entry by assignment prior to patent and, therefore, has no preference right under section 20.

In his petition stated under oath appellant stated: "Affiant acquired title to the above described homestead prior to the time his mother died, which was in 1936." If this statement is true, clearly Smith took the entry by transfer or assignment prior to the death of the entryman and must be considered as an assignee of the entry. Thus, he would not be entitled to a preference right since the assignment was made after January 1, 1918, and, therefore, no

preference right to such an assignee can be recognized under section 20 of the Mineral Leasing Act. A letter of August 10, 1964, from R. B. Bowman, as Smith's attorney, stated that Smith "now holds the record title to these lands under a tax sale." A later letter of October 16, 1964, from that attorney stated that there had never been any determination of heirship or probate of Nancy Cook's estate. He stated that Smith is the present record owner, subject to a contract of sale to Mrs. Eunice Zurawski, and that it is for the purpose of furnishing merchantable title that he required the patent.² He stated the basis of Smith's title "is a Commissioners' Tax Deed as well as his adverse possession of the property for more than 10 years." A copy of this deed, dated April 2, 1941, to Smith is in the record, Cheyenne 043893. In the final statement to supplemental reclamation proof, Smith certified that "I made or hold as an assignee Homestead Entry No. 043893." The certificate for patent stated, "James W. Smith, assignee by mesne conveyance of Nancy Cook." From the above, it is evident that Smith's interest in the entry was as an assignee, and he is not entitled to a preference right.

JOAN B. THOMPSON, *Member*.

I CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

² If the land upon which the preference right is based has been conveyed by Smith, obviously neither he nor the transferee would have a preference right.

ESTATE OF SPEAR

1 IBIA 284

Decided July 18, 1972

Petition by the Bureau of Indian Affairs (Area Director of Billings, Montana) for reopening to determine the heirs of this decedent, and to obtain an order of distribution of the mineral rights in 40 acres of decedent's allotment which accrued to the heirs on March 3, 1971, under the provisions of the Fort Belknap Allotment Act.

Denied.

100.0 Indian Probate: Generally

The Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) and the Acts which it amended are construed in *pari materia* with each other and with the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U.S.C. 331 *et seq.*) as amended.

145.0 Indian Probate: Board of Indian Appeals: Generally

When the Bureau of Indian Affairs petitions for the correction of an error in a probate order issued more than three years prior to the date of petition, the matter may be finally decided for the Department by the Board of Indian Appeals in the exercise of the discretion reserved by the Secretary in 25 CFR 1.2 and delegated to the Board in 43 CFR 4.242(h).

270.0 Indian Probate: Indian Reorganization Act: Generally

The Indian Reorganization Act of June 18, 1934 (48 Stat. 985, 25 U.S.C. sec. 464), under which the tribes of the Fort Belknap Reservation placed themselves by an affirmative vote in the election held for that purpose on October 17, 1934, followed by a constitution approved December 13, 1935, and a charter ratified Au-

July 18, 1972

gust 25, 1937, did not enlarge upon but rather it restricted the right of the allottees and their successors to dispose of trust property by will.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

When the authority granted to a hearing examiner in 43 CFR 4.242(a) to reopen a decided probate has expired, the Board of Indian Appeals may consider the matter under 43 CFR 4.242(h), and under the authority delegated there may exercise the Secretary's discretion to reopen, but the petition to reopen will be denied when a full consideration of the record discloses that the original decision contained no error.

425.0 Indian Probate: Wills: Generally

The expectancy of title to minerals under an allotment created upon issuance of a trust patent under the Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) is trust property capable of disposition by will.

OPINION BY MR. McKEE

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board of Indian Appeals upon a petition for reopening filed by the Area Director for the Bureau of Indian Affairs at Billings, Montana. The decedent, Spear, Fort Belknap allottee No. 40, died December 12, 1934, leaving his will dated May 21, 1929, which was approved by the order of the First Assistant Secretary of the Interior on March 13, 1936, Probate No. 1696-36. Although the order approved the will, there was no finding or determination of the decedent's heirs under

the Montana laws of descent. Since the order approving the will was entered more than three years prior to the filing of this petition, it was forwarded by the hearing examiner to the Board of Indian Appeals for consideration under 43 CFR 4.242(h). The examiner indicated that there are twenty cases in which a similar problem exists, but no information concerning the dates of death was furnished.

At the date of his death this decedent was the owner of his own allotment consisting of 400 acres which he had acquired by trust patent dated March 19, 1927, issued under the Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355). The identity of the holder of the title to the minerals underlying 40 acres of that allotment described as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 21, T. 28 N., R. 23 E., M.P.M., is the subject of doubt in the mind of the Area Director. He is petitioning here for the reopening of this probate for the purpose of obtaining a determination of the heirs of the decedent. The last sentence of section 6 of the Act of March 3, 1921 (41 Stat. 1355) under which the decedent was allotted is as follows:

* * * That at the expiration of fifty years from the date of approval of this Act the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted or granted lands shall become the property of the individual allottee or his heirs, but the right is reserved to Congress to extend the period within which such reserved tribal rights shall expire. (Italics supplied.)

Congress took no action to extend the fifty year limitation before it expired March 3, 1971.

The trust patent issued to the deceased included the provision, "Provided that any and all minerals * * * shall remain tribal property, as provided in the said Act." Under the Departmental decision in the *Estates of Elaine Looking and George Looking*, 68 I.D. 75 (1961), the omission from the patent of any reference to the statutory right to the expectancy in the minerals at the expiration of the 50 years, is not fatal. Additionally the Act specifically provides for the allotment to the Indian of the surface of those lands from which minerals are reserved, and the patent is correct in that respect.

By memorandum of April 30, 1971, a copy of which was attached to the petition for reopening, the Field Solicitor at Billings, Montana, advised the Area Director that section 6 of this Act required a determination of the heirs of this decedent since the minerals reverted to the allottee "or his heirs" at the expiration of the 50 year period, and that the minerals did not pass by the allottee's will to his devisees. By report, the Field Solicitor has also ruled that this limitation in the Act applied only to the original allottees, and that the heirs of an allottee might pass their inherited expectation of title in the minerals by will. This decedent owned no inherited interests.

The ruling of the Field Solicitor would have application in probate

of subsequently deceased parties as to the 40 acres of minerals here in question since it is alleged that this decedent's nephew and apparent sole heir at law, Curly Head, died testate in 1938, and that the devisee named in his will is also deceased, having died prior to March 3, 1971.

It would further appear that the two devisees named by this decedent in his will are still living, and the Field Solicitor appears to have no problem in recognizing their title to 400 acres of surface and 360 acres of mineral rights acquired by them through the will. The rationale for this conclusion escapes us. The Fort Belknap Act *supra* makes no provision whatever for the devolution, by inheritance or by will, of the title of any allottee who may die after issuance of a trust patent except as it provides for passage of the *reserved mineral interests* to "his heirs."

We cannot agree with the conclusions reached by the Field Solicitor for the following reasons. The Fort Belknap Allotment Act of March 3, 1921, *supra*, is in general a continuation of the policy of Congress toward the Indians initiated by the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U.S.C. sec. 331 *et seq.*). Section 5 of that Act provided that upon the approval of the allotment the Secretary should cause patents to issue therefore to the allottees which patents

* * * shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to

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whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *

This Act was followed almost immediately by the Act of May 1, 1888 (25 Stat. 113), entitled "An Act to Ratify and Confirm an Agreement with the Gros Ventre [of the Fort Belknap Reservation] Piegan, Blood, Blackfeet, and River Crow Indians in Montana and for other purposes." By the Act of 1888, the agreement of February 11, 1887, between the United States and the tribes was ratified and confirmed. Under the agreement large tracts of land were ceded to the United States. Article VI pertaining to the Fort Belknap tribes provided in language almost identical to that in the General Allotment Act that:

Upon the approval of said allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the *Territory of Montana*, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. (*Italics supplied.*)

Thereafter, by the Act of June 10, 1896 (29 Stat. 321), in section 8 beginning at page 350, a further agreement with the Indians on the Fort Belknap Reservation entered into on October 9, 1895, was ratified. The Act included approval of like agreements with the Indians of other bands and tribes by which additional large tracts were ceded to the United States. The said section 8 of the Act includes the entire Fort Belknap agreement. In Article V of the agreement it is recited that by reason of the scarcity of water on the reservation which rendered the pursuit of agriculture difficult and uncertain, "it is agreed" that until such time as a majority of the adult males of the tribes request it, there shall be no allotments in severalty. The land of the reservation was to be used for grazing purposes by the members of the tribe on a communal basis. In Article VIII it was further provided, "All of the provisions of the agreement between the parties hereto, made February 11, 1887, [Act of May 1, 1888, *supra*] not in conflict with the provisions of this agreement, are hereby continued in full force and effect."

Thereafter, Congress amended the General Allotment Act by passage of the Act of June 25, 1910 (36 Stat. 855), entitled, "An Act [t]o provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes."

In section 1 of the Act the provision was made for the determination of heirs, not pertinent here except that it did provide,

That when any Indian to whom an allotment of land has been made, *or may hereafter be made*, dies before the expiration of the trust period and before the issuance of a fee simple patent, *without having made a will* disposing of said allotment *as hereinafter provided*, * * * (Italics supplied).

Section 2 of the Act provided for the first time that an Indian might dispose of his trust property by will:

That *any Indian* of the age of twenty-one years, or over, *to whom an allotment of land has been or may hereafter be made*, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with the rules and regulations to be prescribed by the Secretary of the Interior: * * *. (Italics supplied.)

Section 2 of the Act of 1910 was amended by the Act of February 14, 1913 (37 Stat. 678, 25 U.S.C. sec. 373), which is currently effective and which provides in part,

That any person of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with the regulations to be prescribed by the Secretary of the Interior: * * *.

It is particularly noted that the Act of February 14, 1913, did not

repeal the opening sentence of section 1 of the Act of June 25, 1910, *supra*.

These amendments of the General Allotment Act were by their own terms of general application to the Indians on all reservations and to allotments regardless of date. These Acts must be considered and construed in *pari materia* with each other, with the General Allotment Act of the Fort Belknap Reservation of March 3, 1921, *supra*, and with its predecessors of 1888 and 1896, *supra*.

Construction of special allotment acts in *pari materia* with the General Allotment Act is necessary in some instances to effectuate the intent of Congress, *Kirkwood v. Arenas*, 243 F. 2d 863 (9th Cir. 1957). The question determined in that case was whether section 5 of the General Allotment Act which provided that upon the expiration of the trust period, the United States would convey the allotment by patent to the Indian or his heirs in fee " * * * discharged of said trust and free of all charge or incumbrance whatsoever: * * *" should be read as a part of the Mission Allotment Act of January 12, 1891 (26 Stat. 712) *as amended* by the Act of March 2, 1917 (39 Stat. 969). The Mission Acts did not include the above-quoted restrictions contained in the General Allotment Act.

The State of California was asserting an inheritance tax claim against an allotment of a deceased Mission Indian and the Court denied the claim on the ground that

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the Mission Indian Allotment Acts should be construed in *pari materia* with the General Allotment Act and held that the lands of the Mission Indians were to be treated and considered under that Act as free from taxation. In reaching its decision the court took note of the Joint Resolution of June 19, 1902 (32 Stat. 744), by the Senate and House of Representatives. The court said in a footnote,

The United States, in a memorandum brief, calls our attention to a Joint Resolution of June 19, 1902, by the Senate and House of Representatives, which we hold is also persuasive that the two Acts should be construed in *pari materia*. That resolution states: "Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes [General Allotment Act of 1887]," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto." (32 Stat. 744.)

Felix S. Cohen who is described in *Squire v. Capoeman, et ux.*, 351 U.S. 1 (1956) at page 8 as "an acknowledged expert in Indian Law," stated at page 817 of his writings in *Handbook of Federal Indian Law*,

Except for the single act of June 25, 1910 (36 Stat. 855), which constitutes a

comprehensive revision of the allotment law, all of the significant general legislation of this period [1910 through 1919] is tucked away in provisions of appropriation acts. (Italics supplied.)

In Cohen's view the Act of 1910 was of general application having prospective effect on existing and on subsequent allotment acts. Section 2 *as amended* in 1913 would on this basis be effective to give those allotted at Fort Belknap under the 1921 Act the right to make testamentary disposition of their interests in allotments including their expectancy in the titles to the minerals at the end of 50 years.

In the situation here confronting us we find that under the Allotment Act for the Fort Belknap Reservation the minerals reverted to the allottee "* * * or his heirs * * *" at the end of a period of 50 years, and the Congress did not include the words "or devisees" in such Act. However, it is the conclusion here that the General Allotment Act of 1887, the amendment thereof in 1910, the further amendment thereof in 1913 and the Allotment Acts for the Fort Belknap Reservation should all be construed together.

To do otherwise would place the Indian in an even more untenable position than that which was assigned to him by the Field Solicitor. If a fully strict application of the Act of 1921 is to be undertaken, then upon our interpretation no allottee's interest except the minerals here considered passes by either descent or by will upon his death.

Escheat to the tribe or to the United States must be presumed.

The Act does provide for the descent of rights, not interests, of unallotted enrollees who die prior to issuance of the trust patent. It is provided in the second paragraph of section 1 of the Act:

Notwithstanding the death of any person duly enrolled as herein provided, allotment *shall* be made in his or her name as though living, the land embraced in such allotment to pass by descent to the legal heirs of the decedent *and be subject to disposition as in the case of lands of other allottees passing upon their death.* (Italics supplied.)

This paragraph may well be construed to add a specific extension of the General Allotment Act so that the entitlement of the enrollee would pass either by will or by descent as if a trust patent had already issued. This was a necessary provision under the requirements in the first paragraph that the entire acreage of the reservation should be allotted pro rata to the enrolled members of the tribes.

Under the Field Solicitor's ruling the surface rights to all of the allottee's 400 acres and the minerals underlying 360 of those acres pass under the decedent's will. We cannot interpret the Act to have this effect.

It is our opinion that Congress did not intend such an incongruous interpretation or application of the Act of 1921, and that therefore the Acts are construed together so that the expectancy of title to minerals in the 40 acres pass to the devisees named in the will together with all his other trust property.

In view of the foregoing conclusions, it is not necessary to consider the effect which the Indian Reorganization Act of June 18, 1934 (48 Stat. 985, 25 U.S.C. sec. 464), might have upon these conclusions except for section 4 which includes the following language:

* * * in all instances such lands or interests shall descend *or be devised*, in accordance with the then existing laws * * * *to any member* of such tribe or of such corporation or any heirs of such member: * * * (Italics supplied.)

This language in our opinion does provide any Indian holding any trust interest on an organized reservation the right to execute a will devising such interest but only to a member of the tribe or to an heir at law.

It is interesting to consider the chronology of events as they occurred. The Act was approved June 18, 1934. Among its other provisions it required that any tribes wishing to come within its scope must hold an election and vote affirmatively to do so. Notice is taken that the tribes on the Fort Belknap Reservation voted affirmatively to do so on October 17, 1934. The decedent died December 12, 1934. The Fort Belknap constitution required by the Act was approved December 13, 1935, and its charter was ratified August 25, 1937. It is unnecessary to decide what date the testator's trust interests, including the expectancy in the minerals, came within the limitations of the Act, since the devisees named in his will were eligible to take as members of the Fort Belknap Tribes in

any event. This is in accord with the Assistant Secretary's order of March 13, 1936, approving the will.

Upon the basis of these conclusions, it is our opinion that a reopening of this estate for the purpose of determining the decedent's heirs under the statutes of descent is not necessary. There being no other reason to determine the decedent's heirs under the laws of descent, the petition to reopen this estate is denied.

This decision is final for the Department.

DAVID J. McKEE, *Chairman.*

I CONCUR:

DANIEL HARRIS, *Member.*

UNITED STATES

v.

WILLIAM A. McCALL, SR.,
 ESTATE OF OLAF HENRY NELSON,
 DECEASED

7 IBLA 21

Decided July 26, 1972

Appeal from decision of Hearing Examiner Graydon E. Holt declaring certain 10-acre subdivisions within several placer mining claims nonmineral in character as of July 23, 1955, and rejecting mineral patent application therefor, Nevada Contest 012928.

Affirmed in part; reversed in part.

Mineral Lands: Determination of Character of—Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Patent

Where (1) an association placer mining claim embracing 80 acres was located for

a common variety sand and gravel prior to July 23, 1955 (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955 (3) a mineral patent has been issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter, it is error to hold such unpatented 10-acre subdivisions within the claim to be nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Determination of Character of—Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Patent

Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Generally—Mining Claims: Discovery: Generally

A single discovery of a valuable mineral deposit is sufficient to validate an association placer mining claim embracing 80 acres, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogeneous nature throughout the entire 80 acre claim.

APPEARANCES: George W. Nilsson, Esq., Monta W. Shirley, Esq., of Counsel, for the Appellants. Otto Aho, Esq.,

Field Solicitor, U.S. Department of the Interior, for the United States.

*OPINION BY MR.
HENRIQUES*

INTERIOR BOARD OF LAND
APPEALS

This is an appeal to the Secretary of the Interior from a decision of a hearing examiner dated February 19, 1971, holding that the land in certain 10-acre subdivisions is non-mineral in character, and rejecting mineral patent application Nevada 012928 for such lands.

Mineral patent application Nevada 012928, filed March 27, 1952, by William A. McCall, Sr., and Olaf Henry Nelson, included the Las Vegas Nos. 1 through 23, and 25 through 27 placer mining claims, situated in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada.¹ The land office manager issued a certificate October 8, 1954, naming all 26 claims. Patent 1211178 was issued thereafter on August 4, 1960, for 40 acres described as SW $\frac{1}{4}$ NE $\frac{1}{4}$ section 22, T. 20 S., R. 60 E., within Las Vegas No. 7 claim.² Patent 27-65-0095 was issued September 25, 1964, for 190 acres described as SE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$

NE $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ section 22 (within Las Vegas No. 1); SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 22 (in Las Vegas No. 2), S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ section 27 (in Las Vegas No. 18), and SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ section 27 (in Las Vegas No. 27), all in T. 20 S., R. 60 E.

A complaint issued October 1, 1964, by the acting manager, Nevada land office, Bureau of Land Management, alleged that the remaining 170 acres within the Las Vegas Nos. 1, 2, 7, 18 and 27 placer mining claims were nonmineral in character.³

Following denial of the allegation, a hearing was held September 30, 1969, at Las Vegas. After hearing testimony and taking evidence, the hearing examiner held that the said land is nonmineral in character and rejected the mineral patent application therefor. This appeal followed.

The appellants make the following assertions:

1. The decision of the hearing examiner was in error because all of the lands covered by each of the placer mining claims in question are mineral in character, mineral having been discovered and removed from each of the claims and from land adjacent thereto.

¹ The claims are adjacent to the boundaries of the city of Las Vegas, Nevada, and lie approximately 6 miles westerly from the Clark County Courthouse in the center of Las Vegas. The claims were located by Vernon D. Bradley, John W. Bonner, N. C. Bradley and G. C. Bradley, on March 20, 1948. Each claim contained 80 acres, for a total of 2,080 acres in the 26 claims. The four locators conveyed the group of claims to Olaf H. Nelson, on June 1, 1948, and he, in turn, conveyed a one-half interest in the group to William A. McCall, Sr., on September 24, 1952.

² A patent, numbered 1211178, inadvertently was issued on August 4, 1960, for 400 acres, being all the land in the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. This patent was canceled March 4, 1964, by the United States District Court for the District of Nevada, in Civil Case No. 471.

³ Las Vegas No. 1: NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ section 22; Las Vegas No. 2: W $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 22; Las Vegas No. 7: NW $\frac{1}{4}$ NE $\frac{1}{4}$ section 22; Las Vegas No. 18: N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ section 27; Las Vegas No. 27: N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$ section 27; all in T. 20 S., R. 60 E., M.D.M.

2. The decision of the hearing examiner was in error because it attempts to make laws, which is in violation of the Constitution which states the Congress shall make the laws, and denies the appellants due process of law.

3. The decision of the hearing examiner was in error because it was contrary to the evidence.

4. The decision of the hearing examiner requiring that there be a market for sand and gravel on certain fixed dates is unconstitutional, illegal, and void.

5. The decision of the hearing examiner was in error because the requirement of "Marketability at a Profit" supplements the "Prudent-man Rule" and therefore should have been published in the Federal Register, and also because it is vague and merely based on the opinion of the Department Solicitor.

Although mining claims on public land cannot be struck down arbitrarily, the Government has the power, so long as it holds legal title to the land and after proper notice and upon adequate hearing, to determine whether the land is mineral in character and the claim valid, and if the land is found to be nonmineral in character or the claim invalid to declare it null and void. See *Best, et al. v. Humboldt Placer Mining Company, et al.*, 371 U.S. 334 (1963); *Standard Oil of California, et al. v. United States*, 107 F. 2d 402 (9th Cir. 1939), *cert. denied*, 309 U.S. 654 (1940).

Prior to consideration of the appellants' contentions of error, it is proper to note here that the Department has ample authority to refuse to issue a patent for mining claims and to order further proceedings at any time before patent issues to determine whether the requirements

essential to establishing the validity of the mining claim have been met. *United States v. H. B. Webb*, 1 IBLA 67 (October 15, 1970); *United States v. Eleanor A. Gray, et al.*, A-28710 (Supp. II) (April 6, 1965); *United States v. United States Borax Company*, 58 L.D. 426 (1943).

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open for investigation and determination by the land department at any time until patent has issued. *American Smelting and Refining Company*, 39 L.D. 299 (1910).

To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable. *United States v. Henrietta Bunkowski and Andrew Julius Bunkowski*, 5 IBLA 102, 79 L.D. 43 (1972).

The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a 160-acre placer claim is dependent upon the character of the deposit and formation, the surrounding geologic conditions,

and all the facts and circumstances of the particular case. *Crystal Marble Quarries Company v. Dantice, et al.*, 41 L.D. 642 (1913).

Where the mineral character of some of the claimed land is contested although a discovery is recognized within the limits of the placer mining claim, the contestee must establish that each 10-acre tract within the entire claim is mineral in character. If the contestee fails to establish the mineral character of any 10-acre tract, that tract is properly excluded from the patent application. *Id.*; *American Smelting and Refining Company, supra*.

We turn now to appellants' first three contentions of error, which are intertwined and will be considered together. It is elementary that the terms "mineral" and "mineral in character" are not synonymous. "Mineral" is generally defined as an inorganic substance occurring in nature, though not necessarily of inorganic origin, which has (1) a definite chemical composition or, more commonly, a characteristic range of chemical composition, and (2) distinctive physical properties or molecular structure. *A Dictionary of Mining and Mineral Related Terms*, U.S. Bureau of Mines (1968).

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agri-

cultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it. *Lindley on Mines*, § 98. Cited with approbation in *Layman et al. v. Ellis*, 52 L.D. 714 (1929).

The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of common variety sand and gravel at unknown depth beneath a dense caliche at the surface does not establish the mineral character of the land in the absence of evidence that extraction of the sand and gravel was economically feasible before July 23, 1955, thereby giving the land a practical value for mining purposes. *Cf. State of California v. E. O. Rodeffer*, 75 I.D. 176 (1968).

A discovery exists

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * * *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing

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that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. *United States v. Coleman, supra*. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer v. Dredge Corporation*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *Osborne v. Hammit*, Civil No. 414, D. Nev. (August 19, 1964).

A succinct discussion on marketability was given recently by the Court in *Alfred N. Verrue v. United States*, 457 F. 2d 1202, 1203 (9th Cir. 1972):

The criteria of marketability for sand and gravel claims was clearly announced in *Foster v. Seaton*, 106 U.S. App. D.C. 253, 271 F. 2d 836, 838 (1959) wherein the court stated:

"* * * 'a mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'"

The most recent and authoritative enunciation of this rule is found in *United States v. Coleman*, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed.2d 170 (1968) and in *Barrows v. Hickel*, 447 F. 2d 80 (9th Cir. 1971). In *Barrows*, the court analyzed

the development of the marketability and prudent-man tests and determined at p. 82, in regard to the "prudent-man test", that:

"Actual successful exploitation of a mining claim is not required to satisfy the 'prudent-man test.'" [citing *Coleman, supra*]

and at p. 83, in regard to the "marketability test" that:

"The 'marketability test' requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. *What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence.*" [Italics in original.]

A patent for a mining claim is an adjudication by the land department and a conveyance of title to the land which the patent describes and raises a presumption of right and regularity in all the proceedings antedating it. *United States v. Beaman, et al.*, 242 F. 876 (8th Cir. 1917). So the action taken by the land office to issue patents for some land in each of the five claims herein contested is *prima facie* evidence of a discovery under the mining laws and of the mineral character of the lands described in the patents.

The question before the hearing examiner was whether the specific nature of the sand and gravel material on each 10-acre subdivision named in the contest complaint was such as to engender a determination that the land was mineral in character within the comprehensive defini-

tion followed by the Department for the past century.

There is no controversy as to the general geology of the area surrounding the contested claims. They are in the valley fill, near Las Vegas, with a very slight slope generally toward the east. The mineral material present is limestone dolomite, eroded and washed down from the higher mountains to the west. This mineral material in easily recoverable form exists over many square miles of Las Vegas Valley. Evaporation of ground water has deposited the suspended calcium carbonate as a cementing agent, building a caliche-type conglomerate of varying thicknesses and hardnesses throughout the area. Action by sporadic run-off water has dissolved or weakened the cementation in and along some of the water courses, which together with wind action, has made small deposits of loose sand and gravel. There are numerous sand and gravel operators active in the Las Vegas area at this time, and there have been many for the past thirty years, with the operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in this proceeding.

What did the government present in support of its charge that the subject lands are nonmineral in character?

W. J. Egan, a mining engineer employed by the Bureau of Land Management, testified as an expert witness of the government. He made the following statements relative to

each of the 10-acre subdivisions herein involved:

Q. What was your determination regarding the mineral character of the contested portion of the claims in question?

A. My determination was: that the land that each of these ten acre tracts was non mineral in character at that time. [sic]

Q. Please state, in detail, the basis of your determination?

A. I traversed each of those ten acre tracts by foot. I observed the condition of the ground relating to all the factors that go to determine the mineral character of a sand and gravel deposit. I made notes, observed the amount of material that was loose, or the amount of fines and low [sic] sand that was on the area. On the Las Vegas No. 1, this tract here, which would be described by legal subdivisions, as being in the northwest of the northeast of the south-east of section 22, range 6, township 20-south, range 60-east. The areas traversed by two small arroyos and, to the east, the sand and gravel had already been removed and there had been some pushing around of material on the extreme eastern edge.

Further to the west, the material is all covered with a small thickness of a small portion of surface gravel then a large portion of blow sand. Further to the west, you will get into outcroppings of hard caliche. On the Las Vegas No. 2, which would be described legally by the two ten acre tracts would be the north-west of the north-east of the north-east and south-west of the north-east of the north-east, section 22, township 20-south, range 60-east. There, again, you have a surface mantle of blow sand with small amounts of gravel. Then, as you proceed westward, the surface mantle tends to thin out and you have outcroppings of hard caliche and it is also evidenced in the arroyo that that runs in the east-west direction and it's probably about two feet deep. In the bottom of that arroyo is clear, visible, pronounced hard pan caliche. As you proceed westward, the same condition prevails in the Las

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Vegas No. 7, section 22, township 20-south, range 60-east and can be described legally as the ten acre tracts comprising the north half of the Las Vegas 7, or as the north-west quarter of the north-east quarter forty acres. The surface mantle in this instance, in this portion of the area, is much thinner than it is further to the east. As you approach the western end of the claim, the caliche outcrops all over and there is little or no surface mantle in the area at all. On the Las Vegas 27, as shown on the previous discussed exhibits and photographs, the entire area is almost exclusively devoid of any surface mantle and caliche is hard.

The same applies to the portion of Las Vegas 18, which is three ten acre tracts and can be described legally as the north-west of the north-west, and as the north-east of the south-west of the north-west and as the north-west of the south-east of the north-west, section 27, township 20-south range 60-east. Based on the observations and conditions that prevail as to the condition of the type of ground and the difficulty that the bulldozer had in ripping [sic]—I might add that the bulldozer averaged somewhere around forty minutes to make each one of these passes. In some instances, he was as much as two hours. Of course, there were some minor ones that were less than that. I think the shortest one was fifteen minutes in which he was able to push up maybe twenty yards of material. In my opinion are [sic] the observations and the other conditions prevailing in that area, I made the determination that the land was non mineral in character as of that date and prior to that time, since there wasn't mineral in character [sic], it had to be non mineral and it was non mineral in character during the preceeding years, also. The operations that were existing in the Las Vegas 18 had discontinued mining sometime in 1956 and they had made no attempt, at that time, to move elsewhere. There was markets [sic] in the area, but

it is that this material could not compete at an economical rate with other producers.

Q. You stated that your last review or examination was September 29, 1969; is that correct?

A. Yes, sir.

Q. Was it your opinion, as of that date, that all the lands involved in this proceeding is non-mineral in character?

A. Yes.

(Transcript 34-37)

Exhibit 11, an aerial photograph taken October 4, 1964, depicts areas of operation within the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. The extent of mining operations on these claims is clearly discernible. The picture shows indications of mining in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ section 22, within the Las Vegas No. 1, and in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 22, within Las Vegas No. 2, as extensions of operations in the adjoining patented portions of these claims. Regardless of his ultimate conclusions, the testimony by Egan does not contradict the visual evidence on the photograph. Similarly, witnesses for McCall testified that sand and gravel was present on the surface of these three 10-acre subdivisions, albeit the loose surface material was slightly thinner than on the patented portion of the Las Vegas Nos. 1 and 2 claims. We are of the opinion, therefore, that the testimony and evidence support a determination that the unpatented 20 acres in the Las Vegas No. 2 claim are mineral in character, since the sand and gravel was mined from these three 10-acre tracts and they contained mineral material of the

same nature as that found in the portions of the claims now patented.

The testimony of Egan indicates that the unpatented portions of Las Vegas Nos. 7, 18 and 27 claims are covered by a thin mantle of sand and gravel overlying a dense caliche. The aerial photograph does not show anything to the contrary. There is indication of scraping of loose surface materials in parts of Las Vegas No. 18, but no indication of any excavating in any of the unpatented portions of these three claims. The witnesses for McCall gave testimony that the buried material on the unpatented portions of these three claims was inferentially of the same character as the material under the patented portions of these claims and of other patented claims adjacent, but they admitted there were less exposed loose material on the surface of the unpatented portions. Egan conceded that in depth the deposits in the unpatented portions were probably similar to those in the patented lands but asserted that the unpatented tracts could not be mined and the extracted material processed economically in competition with other producers in the Las Vegas area as of 1955. The appellants did not offer any substantive rebuttal to this testimony. McCall testified as to past production from all five claims, with no definite figures for any one claim. He indicated that although his partner, O. H. Nelson, had been active as a contractor prior to his retirement in 1951, and had mined

large quantities of sand and gravel from all his claims, he, McCall, had a policy not to attempt to operate a sand and gravel business but rather to license contractors or others to take material from the claims and pay him a royalty. He stated that he had charged a royalty of 5 cents a yard prior to 1954, at which time he raised the rate to 10 cents. In 1966 he effected a further raise of 15 cents a yard.

The testimony indicates that prior to July 23, 1955, sand and gravel operations in Las Vegas Valley were largely limited to surface deposits because they were loose, most easily loaded and economical to mine. The caliche was not competitive in the market, even though it could be processed into the same kinds of material, due to the greater expenses entailed because of heavier equipment needed to rip the material or because of the need to drill and blast to break the rock. The excess costs for working the caliche were estimated to amount to 35 cents a yard.

We agree with the hearing examiner's conclusion that the unpatented portions of the Las Vegas Nos. 7, 18 and 27 claims are non-mineral in character because of the failure of the appellants to show that, at the time when the mineral material present on the subject lands was open to location under the mining laws, the mineral material could be mined, removed and marketed at a profit in the local market area. The mineral on these 10-acre tracts was not of as high a quality as that which was being

mined, removed and marketed at a profit from the now patented portions of these claims.

We turn now to the contentions of the appellants relating to marketability. In connection with discovery, satisfaction of the test of marketability as a proper complement to the prudent man rule is well established. *United States v. Coleman, supra*; *United States v. Barrows et al.*, 404 F.2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969). Application of the marketability test to a determination of validity of sand and gravel claims in the Las Vegas area has been sustained repeatedly. *Palmer v. Dredge Corporation, supra*; *Foster v. Seaton, supra*; *Osborne v. Hammit, supra*. As has been shown above, for land to be determined to be mineral in character the rule has always included demonstration of removing and marketing at a profit. See *Lindley on Mines, supra*. We dismiss the contentions as being without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the hearing examiner's decision is affirmed as to the contested lands within the Las Vegas Nos. 7, 18 and 27 placer mining claims, and is reserved as to NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ section 22 (within Las Vegas No. 1 claim) and to W $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ section 22 (within Las Vegas No. 2 claim), which are herein determined to be mineral in character and for which mineral patent may

be issued in response to application Nevada 012928. The case is remanded to the Bureau of Land Management for appropriate action consistent herewith.

DOUGLAS E. HENRIQUES, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

NEWTON FRISHBERG, *Chairman*.

APPEAL OF JOHN H. MOON & SONS

IBCA-815-12-69

Decided July 31, 1972

Appeal from Contract No. NPS-WASO-
NATR-V-63/17

Natchez Trace Parkway Project 3T3
National Park Service.

Sustained in Part—Dismissed in
Part—Denied in Part.

Contracts: Disputes and Remedies:
Jurisdiction—Rules of Practice: Ap-
peals: Dismissal

Claims for costs attributed to Govern-
ment delays in relocating utility poles
and in providing slope stakes arising on
a project for the construction of a por-
tion of the Natchez Trace Parkway
(together with a derivative claim for
stretchout and other delay costs) are dis-
missed as not within the purview of the
Board's jurisdiction absent a pay-for-
delay provision in the contract under
which the claims would be cognizable.

Contracts: Construction and Operation:
Notices—Contracts: Construction and
Operation: Changes and Extras—Con-
tracts: Construction and Operation:

Subcontractors and Suppliers—Contracts: Construction and Operation: Contracting Officer

A claim prosecuted by a grading subcontractor in the name of the prime contractor and based upon the alleged improper refusal by a resident engineer to approve a borrow pit for use within a reasonable scraper haul of fill areas requiring the use of borrow is denied where the grading subcontractor failed to follow known and established procedures for obtaining timely review of the resident engineer's decision by the district engineer before the borrow forming the basis of the claim was placed, thereby foreclosing the Government from exercising options which would otherwise have been available to it and which the procedures established for review of subordinate's decisions were designed to secure.

Contracts: Performance or Default: Excusable Delays—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Appeals: Extensions of Time—Rules of Practice: Evidence

Where the Government was found to be responsible for an indeterminate portion of a delay in having utility poles relocated on a road construction job and information having a direct bearing on the propriety of the amount of liquidated damages assessed was either in the possession of the Government or more accessible to it than it was to the appellant, no attempt should be made to apportion the delay between the parties and the Board therefore holds that the appellant is entitled to have the contract time extended to the date the contract was determined to be substantially complete.

APPEARANCES: For the appellant, Mr. Robert B. Ansley, Jr., Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia; for the Government, Mr. Justin P. Patterson, Department Counsel, Washington, D.C.

OPINION BY MR. McGRAW

**INTERIOR BOARD OF
CONTRACT APPEALS**

Claims totaling \$268,813.84 have been asserted under the instant contract on the grounds that various actions by the Government greatly increased the cost of and the time required for the construction of Natchez Trace Project 3T3 in Claiborne County, Mississippi, consisting of grading, structures, aggregate base, surfacing and other work.¹ Pursuant to the terms of a stipulation between the parties another appeal² involving the same contractor and the same grading subcontractor was settled during the course of the hearing (Tr. 240). The testimony taken and the exhibits introduced in evidence at the consolidated hearing will be considered in reaching our decision on the issues involved in this appeal.³ The only questions presented relate to entitlement (Tr. 279).

Contract No. NPS-WASO-NATR-V-63/17 was awarded to John H. Moon & Sons, on June 28, 1963, in the estimated amount of \$1,179,785.75.⁴ It provided for the

¹ Appellant's Posthearing Brief, pp. 1-3. The time extensions sought involve a total of 150 days. The contract time for performance as extended was overrun by only 63 days, however, for which the appellant requests the release of liquidated damages assessed in the amount of \$12,600.

² IBCA-814-12-69 (Natchez Trace Parkway, Project 3P2, Madison County, Mississippi).

³ Tr. 7-9, 120, 1037-40.

⁴ Findings of Fact and Decision dated October 29, 1969, p. 3. Appeal file, IBCA-815-12-69, Volume II. Except as otherwise noted, all references are to documents contained in such appeal file.

work covered thereby to be completed within 500 calendar days from the date of receipt of the notice to proceed. The contract was placed by the National Park Service of the Interior Department but was administered by the Bureau of Public Roads of the Department of Commerce. Prepared on standard forms for construction contracts, the contract included the General Provisions set forth in Standard Form 23-A (April 1961 Edition) and a number of Special Provisions. It also cited the provisions of Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-61 (January 1961), U.S. Department of Commerce, Bureau of Public Roads.⁵ The notice to proceed, dated July 30, 1963, was received by the

contractor on August 2, 1963, making August 3, 1963, the date on which the count of contract time began. Work actually commenced on August 19, 1963, and was determined to be substantially complete on October 8, 1965 (Tr. 731).⁶

The several claims involved in this appeal were not formally presented to the Government until March 19, 1968. In a letter of that date⁷ the contractor requested (i) an equitable adjustment of the contract based upon claims outlined in an accompanying letter from its grading subcontractor, H. W. Caldwell & Son, Inc., dated March 12, 1968,⁸ and (ii) an extension of time

⁵ One of the provisions so included in the contract reads:

"8.7 Suspension of Work. The engineer may, by written order, suspend the performance of the work, either in whole or in part, for such periods as he may deem necessary due to:

"(1) Weather or soil conditions considered unsuitable for prosecution of the work, or

"(2) Failure on the part of the contractor to:

"(a) Correct conditions unsafe for the workmen or the general public;

"(b) Carry out orders given by the engineer; or

"(c) Perform any provisions of the contract.

"Suspension of work on some but not all items, shall be considered 'partial suspension.' Suspension of work on all items shall be considered 'total suspension.' Work of an emergency nature ordered by the engineer for the convenience of public traffic, and minor operations not affected by nor connected with the cause of suspension, if permitted by the engineer, may be performed during a period of total suspension.

"Any adjustment of contract time for suspension of work shall be made as provided in Article 8.6." (FP-61, p. 27.)

⁶ Findings, note 4, *supra*. The grading work commenced on October 31, 1963 (Government Exhibit D; Tr. 698). The great bulk of the clearing work was performed under a sub-contract placed by the grading subcontractor, H. W. Caldwell and Son, Inc. Clearing began considerably earlier than the grading work and was substantially completed in November of 1963 (Tr. 257, 846).

⁷ Appeal File, Volume II. Claim Letters and Collateral correspondence.

⁸ Note 7, *supra*. The Caldwell claim letter was accompanied by a five-page letter dated February 28, 1968, from Mr. John C. Rushing to Mr. Edward S. Caldwell. Additional information was furnished to the Government in Caldwell's letter of January 14, 1969, in which it was stated:

"* * * The estimates in Claim A of \$15,000 and 60 days time extension and Claim B for \$15,000 and 20 days time extension were arbitrarily split from an estimated direct cost estimate of \$30,000 and 80 days time extension, which were estimated by the contractor in the same manner in which we price all of our bids, which is from past experience and a close study of the available information relating to the extra work involved. * * * These delays started affecting our cost of operation from minimal to an increasing intensity from March 12, 1964 through May 22, 1964. Our operation records show that during this period our dirt hauling efficiency dropped to an average of 43.1% of job calculated capacity. This capacity was arrived at

Footnote continued on next page.

sufficient to release the withheld liquidated damages. In the March 12th letter the subcontractor (hereinafter frequently referred to as Caldwell) designated the four claims involved in this appeal by the letters "A" through "D". The claims have been consistently so identified in the subsequent correspondence and proceedings. The same references will be retained in this opinion.

Claim A requests an equitable adjustment of the contract price of \$15,000 and sixty days additional time for extra work allegedly caused by the Government's failure to relocate in accordance with the contract terms and obligations certain power poles and telephone poles. Claim B involves a request for an equitable adjustment of \$15,000 and an extension of time of twenty days for the extra work that Caldwell was allegedly required to perform as a result of not being able to timely obtain construction stakes in specified locations and not being permitted to excavate in certain areas for some time⁹ in consequence of which the subcontractor's sequence of op-

erations and methods of performance were adversely affected and its costs increased.

Claim C makes a request for an equitable adjustment in the amount of \$76,000 and an extension of time of seventy days for the stated reason that Caldwell was not allowed to use a particular pit as a source of borrow materials within a reasonable scraper haul of the pit location even though (i) the material in the borrow pit either met specifications or, if there was a difference, it was negligible (ii) the situation presented clearly fell within the provisions of section 4.2¹⁰ of the contract au-

trated by the testimony of Mr. Rushing on direct examination concerning Claim A:

"* * * my contention is in building a job we are entitled to * * * the job in its entirety * * * the ideal situation is to go through and base in all your low ground to facilitate your operations during adverse weather conditions. Any time any part of it is restricted, then it restricts that procedure. And this is done, I think, throughout the industry." (Tr. 260-61.) Similar testimony was given with respect to Claim B. (Tr. 271-72). See also Tr. 259, 846.

¹⁰ The clause reads:

"4.2 *Changes*. It is mutually agreed that it is inherent in the nature of highway construction that some changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions and that it is of the essence of the contract to recognize a normal and expected margin of change within the meaning of the clauses 'Changes' and 'Changed Conditions' in the 'General Provisions' of the contract as not requiring or permitting any adjustment of contract prices, provided that any change or changes do not result in (1) an increase or decrease of more than 25 percent in the original contract amount, in the quantity of any major item, or in the length of the project, or (2) a substantial change in the character of the work to be performed under a contract pay item or items that materially increases or decreases the cost of its performance. * * *

"Any adjustment in compensation because of a change or changes resulting in one or more of the conditions described in (1) and (2) of the foregoing paragraph, except a change in project length by more than 25 per-

Continued from previous page.

after deducting for down time of mechanical problems and also allowing for weather." (Appellant's Exhibit 2.) John J. Jordan, the then assistant resident engineer, questioned this assessment of hauling efficiency in view of what is shown in Government Exhibits D and E (Tr. 445).

⁹ A recurring theme in the testimony offered by appellant was that it was entitled to have unrestricted access to the whole project. Uncontested is the contracting officer's finding that during the period in question work was underway on other portions of the project (Tr. 271, 845). The appellant contends, however, that during such time work proceeded under more adverse conditions than would otherwise have been the case, as is illus-

thorizing minor changes to meet field conditions (iii) later these specifications were changed under similar circumstances for a portion of the work on this same project and on another project and (iv) it was customary in the industry for such a change to have been made under this type of contract. The refusal to permit the pit in question to be used allegedly required Caldwell to obtain other material at a greatly increased haul distance and cost over what had been contemplated when the job was bid.

Claim D requests an equitable adjustment in the amount of \$116,160.20 for the extra work caused by the foregoing claims or any two of them. In support of the claim Caldwell asserts that but for extra work involved in Claims A, B and C it would have substantially completed the grading items within the first four months after they moved on the project (*i.e.*, by May 1, 1964).¹¹ It alleges, however, that because of

cent, shall be made in accordance with the provisions of article 9.3. Any adjustment in contract time because of such change or changes shall be made in accordance with the provisions of article 8.6. Any change in the project length of more than 25 percent or any other change not within the general scope of the contract shall require a supplemental agreement." (Government Exhibit H, FP-61, p. 5.)

¹¹ Tr. 313-14. John Jordan (assistant resident engineer and later resident engineer on project 3T3) testified at length concerning the contractor's planned progress as shown on the progress chart (Government Exhibit A) and as incorporated therefrom in Government Exhibit D (Actual vs Planned Progress). On cross-examination he pointed out that the Progress Chart submitted by the contractor (Government Exhibit A) gave no indication that the majority of the earth would be moved within the first four months with the remainder of the time to be utilized for finishing (Tr. 524-27).

the problems encountered it had to maintain grading equipment on the job longer than planned; that it had to maintain a complete spread of finishing equipment and necessary men for this operation during the period from May 1, 1964, to September 30, 1965; that if it had not been required to perform extra work it would have timely completed the job by November 15, 1964; and that because the job was not completed on time, the partially completed items of work were exposed to an additional winter which had not been anticipated and which made much rework and refinishing necessary. The following categories of costs are involved in this claim:

(a) The cost of all grading equipment that had to be maintained on the job after May 1, 1964, with the exception of the small scraper that was included in the finishing operation.

(b) The home office and project overhead for the period from November 15, 1964, the estimated timely completion date, until September 30, 1965, the actual completion date resulting from the extra work.

(c) The cost of maintaining the finishing spread on the job for the additional time from November 15, 1964, until September 30, 1965.¹²

The subcontractor's formal claim was presented to the prime contractor for transmission to the Government approximately 2½ years after

¹² The costs included are broken down as follows on page 5 of the claim letter:

"1. Home Office and job overhead from November 15, 1964, to September 30, 1965—10.5 months at \$1,500 per month—\$15,750.

"2. Equipment, itemized hereinafter—\$41,048.14.

"3. Labor, itemized hereinafter—\$48,802.04.

"4. Ten (10) percent profit—\$10,560.02."

the project was determined to be substantially complete on October 8, 1965 (Tr. 731), some $3\frac{3}{4}$ years after the conditions complained of with respect to Claims A and B had been remedied and over $4\frac{1}{4}$ years after the subcontractor was notified that tests¹³ made of the samples taken from the borrow pit involved in Claim C had disclosed that much of the material did not meet the specification requirements.¹⁴ Testifying in the companion appeal involving Project 3P2,¹⁵

¹³ Government Exhibit I, Tr. 867-69, 988-89. It has been held that a belated claim casts a heavier than usual burden of proof on an appellant. *John R. Chrisman & Associates*, ASBCA No. 16358 (September 3, 1971), 71-2 BCA par. 9068.

¹⁴ After referring to the statement at page 8 of the findings that the contractor's March 19, 1968, letter was the first notice of claim to the Government, the appellant's posthearing brief calls attention to an earlier letter from Caldwell dated March 17, 1966 (Appellant's Exhibit No. 3), and to the Government's memorandum of April 25, 1966 (Appellant's Exhibit 4, IBCA-814-12-69), as well as to the initial conversation between Mr. Rushing and Mr. Herrin (Posthearing Brief, p. 9).

¹⁵ This concerned a dispute involving tolerance that had arisen in the latter part of May of 1965 (Tr. 59, 87), or approximately a year after the problem involving the utility poles and the staking on Project 3T3 had been remedied. On direct examination Mr. Caldwell testified as follows:

"* * * the actual legality of how to collect and how to do it, I wasn't certain. And I wasn't really certain after talking to y'all. * * * I didn't know there was such things as constructive change orders, I had heard it, but I didn't know what that meant. * * * Until I went and took that course, I didn't understand. * * * (Tr. 100)."

The "talking to y'all" may have reference to the conference mentioned in Caldwell's letter to the prime contractor dated December 16, 1966, in which with respect to projects 3P2 and 3T3, the letter stated:

"* * * it is my desire to hold these two projects open until some time after the first of the year, at which time I plan to go over claim material with my attorney in Atlanta, Georgia. * * *" (Appeal File, Volume II,

Mr. Caldwell indicated that the delay in presenting the claim there in question had stemmed in part at least from his unfamiliarity with the doctrine of constructive change.

Chronology of Significant Events

Before examining the conflicting contentions of the parties with respect to the several claims, it would perhaps be helpful to summarize significant events which transpired over the active life of the contract with a view to providing background for the decisions reached on the claims presented.

Less than two weeks after the award of contract, a preconstruction conference was held in the District Office, Bureau of Public Roads, Florence, Alabama.¹⁶ Among the conferees was John Rushing, representative of the proposed subcontractor for the earthwork, H. W. Caldwell and Son, Inc. (Tr. 246). The Government representatives included Henry T. Gorschboth, District Engineer, R. S. Banks, District Office Engineer, D. J. Herrin, Resident Engineer (Project 3T3) and J. J. Jordan, Highway Engineer (Project 3T3).¹⁷ The memo-

Claim Letters and Collateral Correspondence.) The week's course referred to was sponsored by "Cal Tech in Los Angeles" in July of 1967 (Tr. 921).

¹⁶ The conference was held on July 11, 1963. See Government Exhibit K. The conference dealt also with the work to be performed on Project 3P2 (i.e., the case settled in the course of the consolidated hearing).

¹⁷ Mr. Banks was involved in Project 3T3 from the beginning of the work, making frequent trips to the project when under construction. He succeeded Mr. Gorschboth as district engineer about September 1, 1964 (Tr. 765). Mr. Jordan was assigned to the

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random discloses that the items discussed included (i) engineering stakeout¹⁸ (ii) stop and resume orders¹⁹ (iii) work hours²⁰ and (iv) telephone lines.²¹

Some time between the preconstruction conference on July 11, 1963, and the commencement of clearing operations in August of

project in July of 1963 and continued to be involved until the project was completed in October of 1965. He succeeded Mr. Herrin as resident engineer in the early spring of 1965 (Tr. 989-91). Mr. Herrin was deceased at the time of the hearing. Comments said to have been made by Mr. Herrin were admitted into evidence over the vigorous objections of Government counsel (Tr. 182-85, 250-51, 865-68). Some of the same objections were raised to allowing the remarks attributed to Mr. Herrin in the Government's memorandum of April 25, 1966, to be received in evidence. (Appellant's Exhibit No. 4, IBCA-814-12-69; Tr. 160-176.) The Government's Posthearing Brief does not contest these evidentiary rulings. We find that such evidence was properly received.

¹⁸ "BPR will do staking for lines, grades, references, centerlines of piers, etc. The contractor is expected to do the layout from this and BPR will check it.

"Stage stakeouts will have to be done on both projects. Neither job was completely staked at the time of the conference. However, it was emphasized that the contractor would not be held up waiting for the engineering stakeout." (Government Exhibit K, 3.)

¹⁹ "Mr. Gorschboth explained that in recent months we have adopted a more liberal policy on stop and resume orders. Many stop orders will probably be issued for even one day. In this way we hope to eliminate claims resulting from weather conditions. * * *" (Government Exhibit K, 5.)

²⁰ "The contractor said they would ordinarily be working only daylight hours. There is a possibility that they will work two 9-hour shifts, 5 days a week. This, however, will be discussed in more detail with the resident engineers and decided on at a later date." (Government Exhibit K, 5.)

²¹ "There are some telephone lines that will have to be moved in connection with the work on Project 3P2 and there was considerable discussion concerning these lines. * * *" (Government Exhibit K, 9.)

1963,²² Caldwell appears to have obtained approval to subcontract the clearing work. In his testimony Mr. Caldwell indicated that securing such approval had created a "difficult situation."²³ The record fails to disclose either the nature of the difficulty or the delay, if any, encountered in securing approval of the proposed sub-subcontract.²⁴ There is some evidence to indicate,

²² Government Exhibit A. As evidenced by such exhibit, the first pay estimate dated September 15, 1963, included some clearing work.

²³ This was one of the factors Mr. Caldwell mentioned as having influenced his decision not to contest the refusal of the resident engineer to approve the use of proposed pit No. 2 as a source of borrow. Mr. Caldwell testified: " * * * in the early part of the job we had gotten in an awful difficult situation due to we first started out with a resistance by them to want to have a sub-subcontractor on the clearing * * *" (Tr. 903-04).

²⁴ The claim letters and the appellant's complaint do not refer to the matter.

²⁵ Testifying on direct examination with respect to Claim A, Mr. Rushing stated: " * * * this is a detour along U.S. 61. As I understand it, originally the plans showed for this detour to go as it is now built. However, it turned out that we had insufficient right-of-way, and it was decided that it would be shortened at the time * * *. At a later date it was decided that it would be built as shown on the plans; and, consequently, we had to go back and clear this several months after our clearing operation had finished, which * * * we weren't equipped to do * * *" (Tr. 256-57).

Mr. Rushing may have been confused as to what in fact transpired. Mr. Caldwell testified: " * * * there was a direction to us at one time that * * * we would build this detour and cut it back into the present 61 at a point that wouldn't involve moving these poles and doing this extra clearing * * *" (Tr. 304). On cross-examination, Mr. Jordan acknowledged that the right-of-way in the area was tight; that there had been a change in the alignment of the detour road; and that if the slope ratio had not been changed, the Government would have been in near proximity to or possibly past its existing right-of-

Footnote continued on next page.

however, that the unanticipated difficulty with respect to the utility poles may have required the subcontractor to perform some unanticipated clearing work with its own forces.²⁵

In an apparent effort to support its staking claim, the appellant introduced a considerable amount of evidence to show when the construction stakeout of various drainage structures was performed.²⁶ On cross-examination Government witness Jordan acknowledged that the project diary for September 18, 1963, contained the following entry under remarks:

Mr. Rushing of Caldwell & Sons, subcontractor for John H. Moon & Sons, came by the office this day and said that he wanted to start laying pipe in three or four weeks. (Tr. 697.)

Testifying as to the general procedure for a construction stakeout on drainage structures, Mr. Jordan stated that in the early part of the project a preliminary stakeout is made at each area where a drainage structure (pipe culvert or box culvert) is expected to be placed; that based upon the preliminary stakeout, computations can be made as to

the length of the pipe, its size and the skew angle at which it is to be placed; that the information so obtained is given to the contractor verbally as soon as it is obtained; that at some later date, usually at the contractor's request, a construction stakeout is made which indicates exactly how much earth is to be removed and exactly where each end of the pipe or box culvert is to be placed;²⁷ and that in a letter written sometime in between the time of the preliminary stakeout and the construction stakeout the information previously furnished to the contractor verbally is confirmed by letter.²⁸

In the course of his testimony Mr. Jordan made clear that the normal practice is for the contractor to order pipe prior to the construction stakeout.²⁹ Upon cross-examination

²⁷ Mr. Jordan offered the following explanation as to the time such stakeout is performed:

"* * * if it had been done earlier at the time of the preliminary stakeout, and it could be done shortly thereafter, the clearing operations and other operations in the area tend to knock these stakes out because they are very vulnerable being right within the area of work" (Tr. 753-54).

²⁸ Tr. 753-54. Government Exhibit R shows that sometimes the letter giving the contractor information as to the size, length and skew of pipe is written much earlier than the time of the construction stakeout. Government Exhibit L shows that such information was furnished to the appellant with respect to the pipe culvert located at Station 592+50 by letter dated January 8, 1964, or approximately three months before the revisions reflected in Change Order No. 4, dated April 10, 1964 (Appeal File, Volume II, Directives and Change Orders) pertaining to the aforementioned pipe culvert became effective. (Tr. 876-78, 734-37.)

²⁹ Tr. 754-56. The following colloquy occurred on direct examination:

"Q. When is this construction stakeout

Continued from previous page.
way (Tr. 621-22). Whatever the reason we note that at the time of the preconstruction conference, no problem with respect to poles was anticipated on Project 3T3 (See Government Exhibit K; note 21, *supra*).

²⁶ Appellant's Exhibit Nos. 12, 13 and 15. The latter exhibit was offered to show information omitted from Government Exhibits G and M covering slope stake work (Tr. 895-96). Government witness Jordan stated that he didn't know why information pertaining to construction stakeout on pipes had been included in Appellant's Exhibit 15 but confirmed that the information shown thereon for such work was accurate (Tr. 945-46, 948-50).

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he testified that there had not been "one occasion on this job that Mr. Rushing had a complaint that a pipe stake wasn't available for him."³⁰

In late October or early November of 1963, a controversy developed as to whether the grading contractor should be allowed to use a roller³¹ on the job which was smaller than that required by the specifications. According to Government witness Jordan, the contractor was informed by the resident engineer that the roller in question could not be used on the project. This resulted in a telephone call to Mr. Banks,³² in the district office in which Mr. Rushing requested permission to use such roller. The request was denied. A short time later when Mr. Gorschboth, the district engineer and Mr. Wilkins, the regional engineer were on the project making a routine inspection,³³ Mr.

Rushing approached them in person and requested relief from the specification requirements insofar as this particular roller was concerned. The request was again denied and Mr. Rushing was informed that any request by the subcontractor should be made through the prime contractor.³⁴ A short time thereafter a written request was submitted by Mr. Rushing to the prime contractor for transmission to the District Engineer.³⁵ The project personnel were subsequently informed that the grading subcontractor would be allowed to use the roller involved in the request³⁶ provided it was used in con-

performed? At whose insistence or at whose request?

"A. * * * Normally what will happen is the contractor's representative will say, 'Okay, I've ordered the pipe; it's on the job. I'll be ready to lay it next week or maybe even tomorrow.'" (Tr. 754.)

³⁰ Tr. 980-81. Mr. Rushing was not recalled to refute this statement. Mr. Jordan acknowledged that he was not present at all of Mr. Rushing's conversation with Mr. Herring. (Tr. 981.) No testimony was offered to show that any of such conversations specifically involved complaints as to pipe staking. Pipe staking is not mentioned in the claim letters or in the complaint. Mr. Rushing's earlier testimony (including, apparently, that reported at Tr. 848-49) was regarded by Mr. Jordan as relating to complaints about slope stakes rather than about pipe stakes (Tr. 983).

³¹ Sometimes referred to in the testimony as a sheep's foot roller.

³² Mr. Banks was then the assistant district engineer (Tr. 484).

³³ The project diary shows that such inspection occurred on November 21, 1963 (Tr. 486).

³⁴ Mr. Rushing testified that in a rather heated discussion Mr. Gorschboth and Mr. Wilkins made it plain to him what rules and procedures he was to follow (Tr. 876). An entry in the project diary reads: "* * * Mr. Rushing was informed that any correspondence from him would have to be forwarded through the prime contractor, John H. Moon & Sons." (Tr. 486.)

³⁵ Mr. Caldwell gave as his opinion that "if there was a letter sent, it was sent to Mr. Moon for forwarding to the project engineer." (Tr. 913.) There is nothing in the record to show whether the correspondence in question was in fact routed through the project engineer (then termed resident engineer). According to the letter from the regional engineer to John H. Moon & Sons, dated July 30, 1963 (i.e., the notice to proceed), no such routing was required. The concluding paragraph of that letter reads: "Future correspondence should be addressed to District Engineer H. T. Gorschboth, Bureau of Public Roads, Greater Alabama Building, 412 South Court Street, P.O. Box 499, Florence, Alabama." (Appeal File, Volume II, Correspondence to the Contractor.)

³⁶ The permission was formalized by Directive I, dated November 29, 1963 (signed by R. S. Banks for Henry T. Gorschboth, District Engineer) and acknowledged by John H. Moon & Sons on December 2, 1963 (Appeal File, Volume II, Directives and Change Orders). It appears, however, that Mr. Rushing was first informed that his request had been granted in a telephone conversation with Mr. Banks on December 9, 1963 (Tr. 487).

junction with but not in lieu of a specification roller.³⁷

With respect to the dispute involving the Government's refusal to permit the grading subcontractor to haul across U.S. Highway 61 at night, Government witness Jordan stated that this was the result of three accidents having occurred on the project between mid-December of 1963 and mid-April of 1964, involving a plan³⁸ for hauling across Highway 547 somewhat similar to the plan presented originally for Route 61 (Tr. 742-45). The dates such accidents occurred and the circumstances as recorded in the project diaries under remarks are set forth below (Tr. 743-44).

December 16, 1963.—One of Caldwell's operators was hurt on the job today. He was placing boards across Highway 547 in order to protect the pavement while moving a tractor across. A school bus failed to heed his flagging and hit one of the boards, which flew up and struck a man in the back. The injury was diagnosed in a Port Gibson Hospital as a cracked vertebra. An unconfirmed report indicates that the school bus had no brakes. Copy of Caldwell's report to the

insurance company will be submitted when available.

January 24, 1964.—At about 7:00 a.m. today a woman driving an automobile east on Highway 547 lost control and hit the roadbank within our right-of-way. Considerable damage to the car and the woman suffered several cracked ribs.³⁹

April 17, 1964.—At about 10:00 p.m. Mr. Fox, a member of the Mississippi State Legislature, hit the ramp which was being used by Caldwell & Sons to haul across Highway 547. Mr. Fox was not injured but seemed quite disturbed and ordered the sheriff and two Mississippi Highway Patrolmen to stay on the scene until lights were put out to him, Mr. Fox's satisfaction. The traffic control devices which were being used included six warning signs on each end, a flagman at the ramp and at least three flares. It was reported that Mr. Fox was ignoring all the warning signs and was traveling at a high rate of speed.⁴⁰

Following the above-testimony Mr. Jordan adverted to safety provisions contained in the contract as set forth on page D-6 under the caption Section 7—LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC⁴¹ and as incorporated therein from paragraph 7.5⁴² of FP-61.

³⁷ Tr. 484-87. Concerning the sheep's foot roller incident, Mr. Jordan stated: "* * * In this one instance there was a disagreement as to interpretation of the specs, and the contractor sought recourse from a level higher than the resident or project personnel, and did, in fact, receive such relief." (Tr. 486.)

³⁸ Commenting upon such plan Jordan states: "At the time the contractor proposed to haul across 547 his plan seemed adequate to us, and there was no question as to whether or not he was endangering the public safety. However, three different occasions occurred, and when the same plan was proposed to haul across 61, which is a much more heavily traveled road, then a question as to adequacy of safety devices was raised." (Tr. 744-45.)

³⁹ Appropos of this entry Jordan added: "* * * the diary also shows that it was raining that day and that none of the contractors were working. However, there was some dirt on the road which caused this woman to lose control." (Tr. 744.)

⁴⁰ The two earlier incidents occurred before any plan was proposed for hauling across Highway 61. Concerning the April 17th incident Jordan stated: "That may have been about the same time or it may have been before or after, but it was generally in the same period of time * * *." (Tr. 745.)

⁴¹ Appeal File, Volume I, the Contract (Tr. 746.)

⁴² In especially pertinent part the provision reads: "7.5 Public Convenience and Safety. The contractor shall take necessary care at all times, in all the operations and use of

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Claim A—Failure to relocate utility poles

The appellant's complaint summarizes the claim as follows in paragraph 4:⁴³

(a) The utility poles on the Highway 61 detour and on the county road which was the old Highway 61 were required to be removed by the Government within a reasonable time, not more than sixty (60) days, after the beginning of work on the project.⁴⁴ The project work was begun in August of 1963

his equipment, to protect the public and to facilitate traffic. * * * No road shall be closed by the contractor to the public except by written permission of the engineer * * * when conditions other than part-width construction necessitate the safeguarding of traffic passing through or by the area of work, the contractor shall furnish flagmen, pilot car, and drivers to direct traffic through sections of road under one-way control. * * * The contractor will be reimbursed for 50% of the eligible labor costs of flagmen and pilot car operators furnished with the prior approval of the engineer. * * *

The same section includes the following provisions reading in part: "7.14 Safety and Reports of Accidents. The contractor shall furnish such safeguards and safety devices and shall take such actions as are necessary to protect employees and the public. * * *" (Government Exhibit H; FP-61, Section 7.—Legal Relations and Responsibility to the Public, pp. 15-16, 19 of FP-61).

⁴³ All four of the claims for compensation are prefaced by the following statement:

"As the result of the Government's actions, the Contractor was required to perform extra work as set out in the following subsections. This extra work related to the grading on the project and was performed by the subcontractor." (Complaint.)

⁴⁴ The basis for the reasonable time test proposed is not apparent. It was Mr. Rushing's opinion that at some reasonable time after the clearing is substantially completed, the contractor is entitled to the job in its entirety. He also testified that the job was substantially complete in mid-November of 1963 (Tr. 846). This was some three months after the contractor commenced work in August of 1963.

but the utility poles were not relocated until May of 1964. The failure to remove these obstructions for an unreasonable period caused the contractor to be required to perform extra work due to changes in the reasonably anticipated method and sequence of work.⁴⁵ The reasonable value of performing said extra work was \$15,000 and required the contractor to remain mobilized and working on its progress toward the completion of its work on the project for sixty (60) additional days.

Except for admitting that the project work was begun in August of 1963 and that the utility poles were not relocated until May of 1964, the Government's answer denies the remainder of the allegations of the complaint with respect to Claim A. The Government also denies that there was any delay to the appellant because of the timing of the pole relocation but asserts that in any event the Special Provision set forth on page D-5⁴⁶ of the

⁴⁵ The rationale for assuming that the Government knew or should have known the particular method or sequence the contractor would choose to employ in performing the contract has not been developed and is not apparent. *Of. Lenry, Inc., et al. v. United States*, 156 Ct. Cl. 46, 52-53 (1962) ("* * * there is no indication in the record that defendant knew, or should have known, of the particular method of operation originally selected by plaintiffs, since it formed no part of this contract. * * *")

⁴⁶ "UTILITIES

"Moving, relocating and adjusting of signals and wires of the Railroad, and of existing utilities, such as water, gas, telephone and telegraph, and electric power lines not provided for in the plans, will be required to be done by their owners during construction under the contract. The contractor shall con-

Footnote continued on next page.

contract precludes payment for any delays to the appellant's work because of such relocation. In his opening statement at the hearing appellant's counsel asserted that when properly construed the contract provision cited was no bar to the claim presented.⁴⁷

In his February 28, 1968, letter,⁴⁸ Mr. Rushing refers to conferences held in late December of 1963 and on April 15, 1964,⁴⁹ in which he had participated and at which the removal and the relocation of the utility poles were discussed with representatives of the utility companies and the Government. On April 17, 1964, Mr. Rushing was ad-

vised that the telephone company would not move their lines⁵⁰ on the detour at Highway 61 until the paper work was approved.⁵¹ Treating April 2, 1964,⁵² as the first date Rushing's diary records a problem attributable to utility poles, the poles continued to be a source of concern to the subcontractor until they were moved on May 18, 1964.⁵³

Mr. Rushing recalled that the number of poles involved in the total project that affected any aspect of the construction was 5 or 6 (Tr. 258).⁵⁴ He took exception to the contracting officer's statement in the findings that the poles had not hindered or stopped the contractor's work or interfered with his sequence

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duct his operations in such a manner as not to interfere unduly with these operations. He shall cooperate with the owners of the utilities in every reasonable manner in the performance of their operations.

"Delays to the contractor's work occasioned by the utility owner's operations will not be considered as a basis for additional compensation, but will be considered for such time adjustments as are specifically provided for under the standard clauses of the contract."

⁴⁷ "The contractor interprets this provision to mean what it expressly says—that delays occasioned by the utility owner's operation will not be considered as the basis for additional compensation. The additional compensation that the contractor is requesting in this claim is considered arising not from any operations of the utility owner, but simply the failure of the Government to have these objects removed, therefore, creating a different circumstance than could reasonably be anticipated upon bidding the project." (Tr. 242-43)

⁴⁸ Note 8, *supra*, pp. 1-3. The accuracy of the letters' contents was confirmed at the hearing (Tr. 247).

⁴⁹ Mr. Rushing's diary entry for that day reads: "Met with Mr. St. John, SEPA, Mr. Ladner, Sou. Bell, Mr. Chambers & Herrin, BPR about power & tel. lines—Detour road at highway 61 is inaccessible to work due to these poles—We have continuously asked for all utility poles to be removed."

"No hauling today—this is due to no stakes south U.S. 61 and to detour not ready." (Government Exhibit O, 4/15/64.)

⁵⁰ The same poles were generally used for both the telephone and the power. Where this occurred on the job, it appears that the poles belonged to the power company (Tr. 620-21, 1001).

⁵¹ The diary entry on that date reads: " * * * Mr. Chambers-NPS—told me today that the tel. Co. would not move their line on detour at Hwy 61 until paper work was approved." (Government Exhibit O, 4-17-64.)

⁵² The appellant's posthearing brief at page 4 relates the diary entries for April 2 and April 9, 1964 (also other dates) to the pole problem even though in such entries only the absence of stakes are mentioned. This is consistent with appellant's view that the problems created by the presence of poles and the absence of construction stakes in the areas in question were all interrelated (Tr. 834, 863; note 8, *supra*).

⁵³ In pertinent part the diary entry reads: "Moved telephone lines on detour at U.S. 61 this AM.—had to clear and grade around them in order to have a place to work. Finished work on detour today." (Government Exhibit O, 5-18-64.)

⁵⁴ Mr. Jordan testified that the number of power poles involved in the work was either two or three (Tr. 621). He also testified that the area where the telephone poles were located did not seem to be of as great importance to the contractor and that while three poles had to be moved only one was in the prism of work (where a cut or a fill had to be made) and that happened to fall down and work proceeded (Tr. 465-66, 597).

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of work. While he acknowledged that the contractor could work elsewhere, he asserted (i) that the contractor was entitled to the job in its entirety⁵⁵ (ii) that since the poles were on high ground they could have been worked sooner after a rain, (iii) that in grading an ideal situation would be to go through and base in all the low ground to facilitate operations during adverse weather conditions and (iv) anytime any part of the job is restricted, it restricts that procedure (Note 9, *supra*). Earlier he had testified as to the difficulty of working around a pole during the course of grading and going back to pick up the loose dirt after the pole has been removed.⁵⁶

Government witness Jordan disagreed⁵⁷ with the foregoing assessment in a number of material respects. First, testifying with respect to the planned progress reflected on Appellant's Exhibit No. 16 (*i.e.*, moving the bulk of the material fairly early and taking more time to

complete the finishing work), Mr. Jordan stated that a definite plan of operation had never been delivered to him by either Mr. Rushing or Mr. Caldwell.⁵⁸ He indicated that the apparent absence of any advance planning by Mr. Rushing had been a matter of concern to the Government.⁵⁹ With respect to the difficulty of grading around the poles, Jordan testified (i) that the Bureau would have allowed the contractor to do no work in the area until they were removed, (ii) that except for the detour itself, no portion of the project hinged on this particular earth being moved, (iii) that the estimated amount of earth involved only one to two thousand cubic yards,⁶⁰ (iv) that

⁵⁵ Tr. 950-954. He also denied that the power poles and the slopes south on the parkway had ever been presented as interfering with the grading subcontractor's whole plan of operation. Because of the good working relationship between Mr. Herrin and himself, he was of the opinion that the former would have discussed these matters with him if they had been presented as matters of great importance (Tr. 952-54).

⁵⁶ In direct examination on surrebuttal the following colloquy occurred:

"Q. Let me refer you to Mr. Rushing's testimony again where he suggested a battle plan or something like that where he proposed to base the fills and work in the high ground when it was wet and work in the low areas when it was dry. Again I ask you if he had told you of such a plan?

"A. No, sir, he never gave us a definite plan. In fact, to help me plan a schedule of work for my men, I asked John on many occasions, I said, 'John, can you tell me what you are going to be doing next week?' And he would say, 'Well, I don't know. It depends on the weather; it depends on this.' And he never would give me a definite answer. We went to work every day not knowing what was going to come up that day. * * *'" (Tr. 954-55.)

⁶⁰ On cross-examination Jordan acknowledged that as much as 20,000 yards may have been involved. The ten fold increase in the estimate was based upon Jordan accepting as true the location of the poles and the depth

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⁵⁵ No provision of the contract is cited in support of this contention.

⁵⁶ " * * * When you get into grading, then you are talking about trying to push a scraper, a machine that's maybe 40 or 50 foot long, with a tractor that's another 20 foot long in a curve, which is extremely difficult * * *" (Tr. 249).

⁵⁷ Both parties agreed that the Government personnel and particularly Mr. Herrin had made concerted efforts to have the poles removed. Mr. Rushing testified that "Mr. Herrin * * * made every effort, along with Mr. Jordan, Mr. Chamberlain, who was the chief ranger, and everybody involved * * * over a long period of time to have them removed. * * * The fact is that they were still there, and they did hinder our operation. At the same time, the Government's personnel was diligent in trying to get them removed." (Tr. 251-52) Mr. Jordan gave similar testimony (Tr. 464-65).

the contractor took only three days to move the material which did not seem to be an unreasonable amount of time, (v) that after the poles were removed, it took the contractor only two or three hours to knock down the two or three mounds that were left, and that (vi) throughout the period in question there was much work available elsewhere.⁶¹

Concerning the benefits of early access to the high ground on which the poles generally speaking were located, Mr. Jordan stated during the course of cross-examination on rebuttal:

One thing we are forgetting about this high ground, assuming that we can come into high ground immediately after a rain or within a very short period of time and we excavate material, we've got to go to a low ground to dump it because we are not going to take it from one high point * * * to another high point. * * * And in a lot of cases a cut area will be available for work in a relatively short period of time after a rain—say maybe eight to 12 hours or maybe in a certain case three hours. But that doesn't

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of the cuts shown on the reverse side of some of Appellant's Exhibits 1 through 1-J (Tr. 633-34).

⁶¹ Tr. 459-63, 946-48, 977-78; Government Exhibits F and G. Upon cross-examination the following exchange occurred:

"Q. * * * The contractor is required by economics to move the cut first and then move the borrow, so that he won't move too much borrow in and be subject to having to carry some borrow out, is that right?

"A. In a situation where there is a question as to the exact balance between excavation and borrow. If the case was such that a fill required say 20% unclassified excavation and 80% borrow, you wouldn't necessarily have to haul the excavation first. You could haul it somewhere in the middle. The only time that you would by means of economics be required not to place the excavation would be in the uppermost levels of the fill" (Tr. 665). Jordan testified to the same effect on surrebuttal cross-examination (Tr. 968-69).

necessarily mean that the area to which it will be hauled will be ready to accept it. (Tr. 973-74)

While the appellant's witness Rushing and Government witness Jordan agreed on the general location in which the poles were located, neither witness was able to precisely locate the poles. With respect to the poles which had caused the appellant the most difficulty,⁶² appellant's counsel attempted to bridge this gap in the evidence by introducing Appellant's Exhibits 1 through 1-J consisting of 11 photographs showing conditions in the vicinity of the poles photographed before and after grading had commenced. The photographs were accepted into evidence on the basis of having been identified by Mr. Rushing who had not taken the pictures, however, and who referred to this fact several times in the course of cross-examination.⁶³

Six of the ten photographs pertaining to the Highway 61 detour had station numbers and depth of cut written on their back surface. Using such references appellant's counsel had Jordan locate on Sheet

⁶² Except for Exhibit 1-H all of the photographs of poles offered in evidence were taken on the south end of the detour at Highway 61 (Tr. 254).

⁶³ Tr. 883-888. Queried as to whether Appellant's Exhibits 1-A, 1-D, 1-E and 1-F were pictures of the same area, he stated:

"A. In my opinion they are. There again, I didn't take them, and I can't say that with any finality. And if its a point I can get Mr. Pugh up here from New Orleans and try to straighten it out." (Tr. 883) Mr. Winston Pugh, a former employee of H.W. Caldwell & Son, Inc., had taken the pictures (Tr. 252, 284). He had been present earlier in the hearing but had not testified; nor was he recalled for the purpose of testifying.

16 of the plans three different pole locations and express an opinion as to the amount of excavation involved in the vicinity of the poles.⁶⁴ Jordan made clear in the course of his testimony that apart from the information so provided, he would not have been able to precisely locate the poles or make any definite calculations.⁶⁵

After making reference to Rushing's testimony involving the poles shown in the exhibits and particularly that given with respect to Appellant's Exhibits 1-D and 1-F,⁶⁶ Government counsel requests that these exhibits be given little or no weight in these proceedings.⁶⁷ In view of the conclusion we reach with respect to Claim A, we express no opinion as to the probative value to be accorded Appellant's Exhibits 1-

A through 1-J or to the testimony based thereon.

The claim as presented is based upon the asserted failure by the Government to timely remove the poles within a reasonable time. Absent a pay-for-delay clause,⁶⁸ this Board has consistently held that claims based upon delays by the Government in performing its contractual obligations are not encompassed within its jurisdiction.⁶⁹ While the Utilities Clause (Note 46, *supra*), clearly precludes payment of compensation for delays to the contractor's work occasioned by the utility owners operations, the parties differ as to whether the clause applies to the circumstances present here. Resolution of the question of the scope of the clause's application⁷⁰ would serve no useful

⁶⁴ Appeal File, Volume I, the contract. Four poles were encircled on Sheet 16 of the plans and designated by the numbers one through four. The pole shown under number 2 however, represented an erroneous location (Tr. 625-634).

⁶⁵ Tr. 631-34, 741-42. " * * I don't have any point of common reference in these photographs. I couldn't definitely say that they are the same pole (Tr. 630). * * I stated that I don't know the exact stationing of any of the poles, and I stated that I recall two or three." (Tr. 632.)

⁶⁶ Tr. 883-888. A portion of Government counsel's interrogation of Mr. Rushing consisted of the following:

"Q. This one here, 1-F, is that tree standing? Has it got roots down in the ground or can you tell or do you remember?"

"A. I don't remember. I think * * this tree was up higher and it slid down and continued to stand, but I'm not sure.

"Q. Well, now wouldn't that have been kind of an unusual event to have happen on a job, a tree slid off a mound and stood standing up?"

"A. I thought it was extremely unusual.

"Q. But you did see it happen?"

"A. I think I did, yes." (Tr. 883-84.)

⁶⁷ Government's posthearing brief at 11-12.

⁶⁸ The Suspension of Work clause incorporated into the contract (note 5, *supra*), is not such a clause. See *Orndorff Construction Co.*, IBCA-372 (October 25, 1967), 74 I.D. 305, 331, 67-2 BCA par. 6665 at 30,910 citing *Seal and Company*, IBCA-181 (December 23, 1960), 67 I.D. 435, 61-1 BCA par. 2387 at footnote 85.

⁶⁹ See *Guy F. Atkinson Co.*, IBCA-795-8-69 (January 6, 1970), 77 I.D. 1, 69-2 BCA par. 8041 and authorities there cited; *Cf. Koppers-Clough*, ASBCA Nos. 12485 and 13119 (May 27, 1971), 71-2 BCA par. 8920 at 41,447 (" * * This is a matter of 'simple' delay, and may not be brought under the Changes article. In the absence of a Suspension of Work clause there is no relief under the contract.") It is pertinent to note that the notice requirements for breach of contract claims may be materially different than for claims asserted under the contract, but it is not the Board's responsibility to determine the notice requirements applicable to breach claims. *Meva Corporation*, IBCA-648-6-67 (August 18, 1969), 76 I.D. 205, 230, 69-2 BCA par. 7838, at 36,434.

⁷⁰ Very recently the Transportation Board had occasion to deny a contractor's claim for the extra costs involved in having to work around utility poles which the utility com-

Footnote continued on next page.

purpose where, as here, there is evidence in the record indicating that the Government may have contributed to the delay⁷¹ in having the poles relocated.⁷²

Claim B—Delaying furnishing stakes and limitations on performance

Paragraph 4(b) of the complaint describes the claim⁷³ in the following language:

(b) The terms of contract required the Government to cause construction stakes to be provided in advance of construction operations so as not to interfere

Continued from previous page.
pany had failed to remove prior to the commencement of work. Both the terms of the Utilities clause and the circumstances of the case are somewhat different than those presented here. See *Cherry Hill Sand & Gravel Co., Inc.*, DOT CAB 72-23 (June 21, 1972), 72-2 BCA, par. 9547.

⁷¹ Tr. 852-858. It was Mr. Rushing's recollection that the telephone company was insisting upon being paid in advance for moving the poles (Tr. 853-55). Addressing himself to this question Government counsel states:

"Mr. Rushing indicated that payment was holding up the contractor, but his diary showed the telephone company on April 17, 1964 would not move their lines until paper work was approved (Rushing, Tr. 855). Whether it was to be approved by the company or the Government, it was apparently a final step in the delay when the utility company finally began making plans to remove the poles. * * *" (Government's posthearing brief, p. 16.)

This view fails to take into account the consequences to the Government of having failed to present evidence to show the extent to which the Government contributed to the delay involved where, as here, it was clearly in a better position to do so than was the appellant (Tr. 852). We also note that more than a month elapsed between the date of the conversation (note 51, *supra*) and the date the poles were finally moved (note 53, *supra*).

⁷² Since the delay is of an indeterminate length, there is no basis for determining whether the delay continued for an unreasonable time in the circumstances in which it occurred.

⁷³ Appellant's complaint, pp. 2-3. See also note 43, *supra*.

with the Contractor's reasonable sequence of operations and method of performance of work. Construction stakes were not provided in accordance with the contract on the parkway south of U.S. Highway 61, and the Government directed the Contractor to not excavate the material in this area until the U.S. Highway 61 detour was paved. These actions of the Government caused extra work to be performed as the result of the changes in the reasonably anticipated operations and method of performance and caused the Contractor to remain mobilized and working toward completion of the work on the project for twenty (20) additional days. The reasonable value of performing this extra work was \$15,000.

Except for admitting that the contract required the Government to set construction stakes for the appellant, the Government denies the remaining allegations pertaining to Claim B, and asserts that construction stakes were timely furnished to the appellant as required by the governing provisions of Article 5.5 of FP-61.⁷⁴

⁷⁴ Government Answer, p. 3. The cited article reads as follows:

"5.5 CONSTRUCTION STAKES. The engineer will set construction stakes establishing lines, slopes, and continuous profile grade in road work, and lines and grades for bridge work, culvert work, protective and accessory structures, and appurtenances as he may deem necessary, and will furnish the contractor with all necessary information relating to lines, slopes, and grades. These stakes and marks shall constitute the field control by and in accordance with which the contractor shall govern and execute the work.

"The contractor shall furnish at his own expense any necessary labor and equipment, stakes, templates, batter boards, and other materials which he may find necessary for any additional measurements or control points required to construct the work.

"The contractor shall be held responsible for the preservation of all stakes and marks and, if any of the construction stakes or marks have been carelessly or willfully destroyed or disturbed by the contractor, the cost of replacing them shall be charged

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Since the appellant considered Claims A and B to be closely allied (note 52, *supra*), many of the arguments advanced with respect to Claim A embrace Claim B as well (Tr. 271-72; note 9 *supra*). In large part, the Government's defenses to both claims are essentially the same. While acknowledging that for a limited period of time the grading subcontractor was confronted with the presence of poles, the absence of construction stakes and limitations affecting excavation, on a relatively small portion of the project, it defends on the grounds (i) that there were other areas where the subcontractor could and did work and (ii) that at no time did the subcontractor present a plan showing that the areas in question were crucial to its whole plan of operation for the project.⁷⁵

From both the opening statement of appellant's counsel and the testimony offered at the hearing, it is apparent that the claim is principally grounded upon the alleged Government delay in timely furnishing construction stakes (Tr. 243, 262-64).

against him, and shall be deducted from the payment for the work.

"In the case of alterations which involve any changes in stakeout, the contractor shall cooperate with the engineer and facilitate the prompt reestablishment of the field control for the altered or adjusted work." (Government Exhibit H, p. 9).

⁷⁵ Tr. 946-48, 977-78; notes 58 and 59, *supra*. Mr. Rushing testified that the staking south of U.S. 61, and the telephone poles initiated the problems. (Tr. 863.)

Insofar as this part of the claim is concerned, we are clearly without jurisdiction in the matter.⁷⁶ The staking portion of the claim is therefore dismissed.⁷⁷

Joined with the staking claim in the presentation at the hearing and in the appellant's post-hearing brief are claims predicated upon Government instructions not to excavate a bluff south of U.S. Highway 61 and not to haul across Highway 61 at night.⁷⁸ Under well-established principles⁷⁹ both of these latter claims are cognizable under the terms of the contract.

⁷⁶ Note 69, *supra*. *Peter Kiewit Sons' Company*, IBCA-405 (October 21, 1965), 72 I.D. 415, 428, 65-2 BCA par. 5157 at 24,275 ("* * * It is clear that under whatever theory appellant seeks recovery of expenses of delay, interruptions, or loss of efficiency alleged to have been caused by Government actions—delay in staking and in the issuance of changes or on delay in the form of extended time of performance—the dispute must sound in breach of contract, where, as in this case, there is no contract provision permitting monetary compensation therefor. As such it is not within the jurisdiction of the Board. Hence, we do not arrive at the question of whether any of the acts or omissions of the Government amounted in fact to breaches of contract. * * *").

⁷⁷ There is thus no occasion for us to reach the question of the inference to be drawn from Government's counsel's failure to call as a witness a Government employee who had knowledge of staking and who was present at the hearing (Tr. 829-830; Appellant's post-hearing brief, 7).

⁷⁸ Tr. 264-268. Appellant's post-hearing brief, 4.

⁷⁹ *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234, *aff'd* upon reconsideration (February 4, 1966), 73 I.D. 49, 66-1 BCA par. 5343; considered in Dec. Comp. Gen. B-158578 (May 24, 1966). *Otto Randolph, Inc.*, ASBCA No. 11539 (October 25, 1966), 66-2 BCA par. 5928 (cited in appellant's post-hearing brief at page 7).

Directives not to excavate bank south of U.S. Highway 61 and not to haul across U.S. Highway 61 at night

The directives not to excavate the bank south of Highway 61 and not to haul across that highway at night⁸⁰ were part of the same verbal order⁸¹ given by the resident engineer based upon his view of what was required to insure the safety of the traveling public.⁸² Mr. Rushing

testified that the subcontractor had been allowed to excavate a bank on the opposite side of U.S. 61 (the north bank) in the vicinity of station 595 (designated as Point A on Sheet 11 of the plans) but had been refused permission to excavate the south bank (designated as Point B on Sheet 11 of the plans) because of safety considerations. He also testified that at the same time they were not allowed to haul across U.S. 61 at night. Mr. Rushing and Mr. Jordan agree that the directives were in effect for two or three weeks⁸³ before they were rescinded as a result of instructions issued by the district office following a visit to that office by Mr. Caldwell.⁸⁴ Mr. Rushing

⁸⁰ The diary of the subcontractor's superintendent does not refer to the directive prohibiting Caldwell from hauling across Highway 61 at night. The following are excerpts from Mr. Rushing's diary (Government Exhibit O) pertaining to the directive not to excavate the bluff south of Highway 61:

"Mr. Herrin says detour road @ U.S. 61 must be paved before opposite bank can be graded. * * * This is first time we have been told about detour being paved before cutting down bank. * * * (4-20-64) * * * We have also been directed to leave bank South side of U.S. 61 until detour is built due to safety of traffic. We did however excavate bank on North side of U.S. 61 and this problem was not mentioned." (5-1-64.) * * * Received permission this morning (8:00 AM) to remove cut parallel and south U.S. 61 * * * (5-19-64).

⁸¹ Tr. 681. The following is an excerpt from the testimony of Mr. Jordan:

"* * * this bluff or a portion thereof had to be removed in order to build the Natchez Trace Parkway. The physical location of a portion of this material, the face of this bluff if you will, was in close proximity to the travelway of Route 61 * * *. The order which was given him by the resident engineer Mr. Herrin was not specifically just do not cut this face, but it also included a provision that he should not * * * haul material across Highway 61 until the detour road * * * had been completed. * * * (Tr. 473).

⁸² Concerning the reason for the issuance of the order Mr. Jordan referred to a profile of the existing Route 61 and a profile grade to be obtained as shown on Sheet 17 of the plans after which he stated:

"* * * Now * * * the crossing of the Parkway over Route 61 was about * * * 700 feet from the crest of a vertical curve, which was to the south of the Parkway. Now, since the contractor had planned to cut this bluff

and immediately haul across Highway 61, it was felt that the nature of the operation was hazardous to the traveling public in that anyone approaching this area from the south would come over the crest of this hill and not have sufficient time to stop if there was an obstruction in the roadway, whether this be a piece of earth moving equipment or some loose material or whatever have you, we didn't feel that this would be a sufficient distance for the man to stop if there was, in fact, an obstruction in the road." (Tr. 473-74.)

⁸³ Tr. 267, 687. For the period the order was in effect Rushing and Jordan appear to have used April 30th or May 1, 1964, as the date the order first issued on April 20, 1964 (note 80, *supra*), became effective. This apparently was because Caldwell did not move into the area affected by the order until April 30, 1964 (Government Exhibit G). The information contained in this exhibit was derived from the project diaries (Tr. 454-55, 694-95).

⁸⁴ In the course of a colloquy with the hearing officer (Tr. 900-08), Mr. Caldwell gave an account of the circumstances surrounding the appeal of the resident engineer's decision to the district office including the following testimony:

"A. I did go to the district office, but I did not write them a letter * * * I went up there with every intention of backing out like a nice fellow if there was some real

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characterized the decisions underlying the issuance of the order as arbitrary and said they were contrary to the plans and specifications. According to Mr. Rushing the effect of the order was two-fold. First, the directives further restricted the areas available for work. Second, the directive not to haul across U.S. 61 at night resulted in the equipment sometimes having to be moved a mile and in some cases cancellation of the night shift. He also took exception to the contracting officer's assessment that work was in full operation at other locations (Tr. 264-73).

Mr. Jordan related the issuance of the directive prohibiting Caldwell from hauling across U.S. 61 to a history of accidents on the job under a plan similar to that proposed for hauling across Highway 61.⁸⁵ He testified that the plan proposed to the project personnel for hauling across Highway 61 had involved the

reason that this should not and could not be done. In other words, I was doing it as an errand boy, and I went to seek relief in that manner rather than put something down in black and white that would get passed around and copied and get this situation stirred up worse than it was. * * * I've always just tried to work it out verbally. And it did so happen that I was really closer than Mr. Rushing and I could get away and he couldn't. That was the reason for my going down there when he called me. * * * (Tr. 903-05.)

⁸⁵ Notes 38-40 and accompanying text. Concerning the reasons for the issuance of the directive not to excavate the bluff adjacent to Highway 61, Jordan gave the following testimony on cross-examination:

"* * * It was to afford the public the greatest safety that we felt they had a right to expect. This danger to their safety could have been caused by material falling onto the highway; it also could have been caused by equipment crossing the highway or equipment dragging material and leaving it on the highway. Anyone of these three." (Tr. 681)

use of one flagman, but that the plan approved by the district office required the use of two flagmen which was definitely more safe.⁸⁶ On cross-examination, Jordan justified the Government's action in having permitted the subcontractor to excavate the bluff on one side of Highway 61 and having refused such permission for the bluff on the opposite side on the following grounds:

A. * * * Now, if we could look at sheet No. 40 of 70 * * * This is a true scale with the same scale being used in a horizontal as well as a vertical direction. * * * We see that in the first place the bluff on the south side is higher than the bluff on the north side. In the second place, the bluff on the south side does not flatten out as quickly as the bluff on the north side. But the main difference as far as the project personnel were concerned, was the fact that the bluff on the north side was not going to be hauled across U.S. 61. In other words, the only possible conflict with U.S. 61 would come at a time when this last corner of this bluff had to be excavated. At other times they were working at areas further away and did not actually enter upon or cross the pavement width of U.S. 61. (Tr. 682)

Mr. Jordan was of the view that the subcontractor had probably not

⁸⁶ Mr. Rushing had no recollection of whether he had proposed one or two flagmen to the project personnel (Tr. 860-61). Queried on cross-examination as to whether it would not have been reasonable for the project office to advise the subcontractor that they considered that two flagmen were needed as a prerequisite to permitting him to haul across U.S. 61, Jordan stated:

"Well, I don't think the situation ever reached such a point * * * this point came up some time prior to * * * when Mr. Rushing planned to start. When he in fact did plan to start this, then he didn't contact the project office, he contacted the district office and appealed to them or explained the situation to them. * * * (Tr. 689-90.)

been affected by the order since when he wanted the order rescinded it was.⁸⁷ He also testified that the order affected only one or two hundred feet on the centerline of the parkway; that if it had stood it would only have continued in effect until the detour road was completed; and that following the completion of the detour road it would still have been necessary to haul across U.S. 61 but that the vehicles would have been visible to the traveling public for a much longer time.⁸⁸

In reaching our decision on this claim we need not resolve the question of whether the resident engineer's instructions to the subcontractor as outlined above represented a proper exercise of discretion under the terms of the contract⁸⁹ when considered in the light of the job's history of acci-

dents,⁹⁰ and the possible dangers to the traveling public;⁹¹ nor need we undertake to resolve conflicts in the evidence as to the impact that these directives had upon contract performance during the time they were in effect. This is because the record is clear that Mr. Rushing was aware of the limited nature of the authority of the resident engineer long before the directives in question were issued and of the fact that if the conditions imposed by him were considered onerous, they could be appealed to the district office.⁹²

There is nothing in this record to suggest that if on April 20, 1964 (note 80, *supra*), or within a few days thereafter an appeal had been taken to the district office, the same relief would not have been provided to the subcontractor then that was obtained within a day or two at the time the appeal was taken on or about May 18, 1964.⁹³ Had this occurred the evidence indicates that the prohibitions against excavating the bluff in question south of Highway 61 and hauling across Highway 61 at night would have been lifted before they ever affected the contractor's operations in any way.⁹⁴ Since all of the contractor's difficulties in these matters stemmed from his failure to timely pursue known and established procedures for securing review of a subordinate's

⁸⁷ On cross-examination he stated:

"A. I think that the plan of action by the contractor, which was proposed to Mr. Gorschboth and which was actually used by him, was somewhat different than what was understood at the project level. * * * when this order was issued, Mr. Rushing was not intending to enter this area immediately. * * * And he was then informed that * * * when the time came, he would not be allowed to do this.

"* * * when his plans reached such a point that he felt he needed to do this work, then he contacted the district office and the order was rescinded to him * * * and was relayed to us that same day." (Tr. 684).

⁸⁸ Tr. 472-80, 680-93. In the course of his direct examination Jordan testified as follows:

"* * * from the time that he sought recourse from the district office until the time it was rescinded was a matter of the same day, or a few hours—possible the next day.

"Q. So, when the problem became serious—

"A. When Mr. Rushing felt that he had to get in here and he sought recourse, the problem or the situation was immediately resolved." (Tr. 478)

⁸⁹ Notes 41 and 42, *supra*.

⁹⁰ Notes 38-40, *supra* and accompanying text.

⁹¹ Notes 82 and 85, *supra*.

⁹² Notes 31 to 37, inclusive, *supra* and accompanying text.

⁹³ Notes 80 and 83, *supra*; Tr. 477.

⁹⁴ Notes 83 and 88, *supra*.

decision, the claim is regarded as without merit and is therefore denied.

Claim C—Government refusal to approve proposed pit No. 2 as source of borrow

The appellant's complaint states Claim C in the following terms:

(c) The Contractor reasonably anticipated and sought to utilize the material in the pit southeast of the right of way at Station 490 as a suitable source of borrow material within a reasonable scraper haul of the location at which the material was to be placed. The material in this borrow pit either met the specifications or was so similar to the material specified that any difference was negligible, and the material was equally suitable. Section 4.2⁶⁵ of the specifications incorporated in the contract and subcontract stated:

"It is mutually agreed that it is inherent in the nature of highway construction that some changes in the specifications may be necessary during the course

of construction to adjust them to field conditions * * *."

The Contractor sought to use this borrow pit material as regular borrow material which throughout the highway construction industry is customarily obtained from local material suitably situated within a reasonable scraper haul from the areas in which it is to be placed. The Government refused to allow the use of the material from this borrow pit, thereby requiring the Contractor to perform extra work by obtaining other material not suitably situated and located at a greater haul distance from the areas in which the material was to be placed. This extra work caused the Contractor to remain mobilized and working toward completion of the work on the project for seventy (70) additional days, and the reasonable value of performing this extra work, involving 152,000⁶⁶ cubic yards of material, was \$76,000.00.⁶⁷

Many of the crucial facts involved in this claim are undisputed. The appellant does not contest the fact (i) that samples of material were taken from proposed Pit No. 2 on October 17 and Octo-

⁶⁵ The full text of the provision appears at note 10, *supra*. In *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661 (1968), the Court of Claims had occasion to consider the effect to be given to somewhat similar language appearing in a contract which included the standard Changes clause and which provided for payment on the basis of unit prices, as is the case here. There the Court stated at page 687 of its opinion:

"In this context, a reasonable interpretation of article 4.3 (as supplemented by articles 9.2, 9.3 and 9.4(c))—when considered in conjunction with the article 3 Changes clause of the contract—is (1) that the purpose of these specifications is to provide a ready means for avoiding controversy when, during the course of performance, the contractor is required, because of unforeseen field conditions, to do, within the prescribed percentage limits, a greater or lesser quantity of work than could be originally estimated; and (2) that a change in such circumstances is compensable under the Changes clause if the extra costs so incurred differ materially from the costs reimbursed through unit-price payments. * * *

⁶⁶ Utilizing Sheet No. 8 of the contract plans Mr. Caldwell drew proposed pit No. 2 thereon in a triangle shape with the center of the mass approximately 500 feet to the left of Station 490 (Tr. 332, 405). He also made a hand sketch (Government Exhibit P) to illustrate his testimony as to the factors governing expansion of the proposed pit to obtain additional acreage (Tr. 914-38). With respect to these endeavors Mr. Caldwell acknowledged, however, (i) that he had made no location measurements, (ii) that no dimensions of the pit were ever taken because it was never actually staked out and (iii) that the 152,000 cubic yards involved in the claim were not based upon any measurements but upon the contractor's need (Tr. 915, 930-31).

⁶⁷ Responding to these arguments the Government's Answer at page 3 states:

"4(c) Denies the allegations in this subsection and, to the contrary, states that the material in the said pit did not meet even the minimum standards of the contract and, since the borrow was Case 2, the contract required the appellant to secure suitable material from pits of the appellant's own choice."

ber 18, 1963,⁹⁸ (ii) that thereafter tests were made of the samples so taken in Government laboratories and by the Mississippi State Highway Department Testing Division,⁹⁹ (iii) that based upon the test results the resident engineer (Mr. D. J. Herrin) informed Caldwell's superintendent (Mr. John Rushing) that the material which did not meet the specifications would not be accepted on the project;¹⁰⁰ and (iv) that no appeal of the resident engineer's decision was taken to the District office until after the contract was completed.¹⁰¹

⁹⁸ Tr. 483, 878.

⁹⁹ Government Exhibit I; Tr. 481. Upon direct examination Government witness Banks stated that the Mississippi Highway Department performs a good many tests for the Bureau of Public Roads as a check on its work (Tr. 774).

¹⁰⁰ Tr. 483. The following colloquy occurred in direct examination of Mr. Rushing on rebuttal:

"Q. Would you have stripped six feet off of any portion where the material was indicated to be bad on pit No. 2?

"A. Yes, we would have stripped six feet. Of course, here is your problem. Some of these borings indicate that in some areas you don't need to strip any. In one boring I think it was A-4 on the top of the ground. In some areas you have to strip six foot or eight foot. The only thing the Government's position was that you know, you can strip it off, but we reserve the right to test it at any given time at any given load, if you wish, on any given day. And if that load on that day doesn't pass, then you are in trouble." (Tr. 866-67.)

We note that the considerations mentioned did not deter Mr. Rushing from stripping six feet off another pit (Tr. 866).

¹⁰¹ At one point in his testimony Mr. Caldwell stated: "* * * we made repeated efforts to try to get it reconsidered. * * *" (Tr. 367.)

What the "repeated efforts" were is not apparent from this record. Elsewhere in his testimony Mr. Caldwell acknowledged that when he saw Mr. Herrin he never raised any question with respect to pit No. 2 (Tr. 907). He also outlined in considerable detail the reasons that prompted him to accept the resident engineer's decision as final (Tr. 901-908).

In other important areas the parties have divergent views of what happened on the job. First, we shall examine the disparate views of the parties with respect to a number of borings some of which were taken in October of 1963, and some of which were taken in September of 1970, or shortly prior to the hearing. The results of the tests made of samples taken from proposed pit No. 2 in mid-October of 1963, were introduced into evidence without objection as Government Exhibit I (Tr. 504). The then District Engineer, Roderick S. Banks (who had had extensive experience in sub-surface investigation, testing of materials and soils) was the principal Government witness with respect to the classifications of soils tested and the significance of the results of the various tests made. After examining Government Exhibit I, Mr. Banks noted (i) that of the three samples from pit No. 2 submitted to the Mississippi State Highway Department Testing Division all had failed to meet the specifications requirements for case 2 borrow of group A-4 and (ii) that of the samples tested by Government personnel some met and some failed to meet the minimum requirements of the specifications. Upon direct examination he gave the following overall appraisal of the test results reflected in Government Exhibit I:

This gives us a pretty good idea of what was in these holes. I don't know where these holes were located specifically in the particular area. There is no way for me to know; there is no information given, merely that they were somewhere

within the proposed area of excavation. While there probably was some acceptable material in this pit, the whole pit would have to be suspect from the lack of uniformity. (Tr. 775)¹⁰²

Two other exhibits were received in evidence reflecting the results of testing of samples of soil taken in September of 1970, as a result of permission granted to Mr. Caldwell by the National Park Service. Appellant's Exhibit 9 is a report to Caldwell from Ware Lind Engineering, Inc., of Jackson, Mississippi.¹⁰³ The report discloses that a total of 11 borings were taken and that duplicates of all samples obtained in Borings 1 through 11 were secured and presented to the Government personnel involved on the project;¹⁰⁴ that tests of two samples taken at 2-feet and 4-feet depths from a cut section near Station 488+00, 46 feet right of centerline (Boring No. 1) resulted in their being classified as A-7 soils; that

three borings were made in the borrow pit area with four samples each being tested from Borings 2 and 3 and with three samples being tested from Boring 4. According to the report the results of the tests indicate that the natural soils occurring in the borrow pit area can be classified generally in group A-4 or A-6.

The report notes that seven¹⁰⁵ additional borings were made along the Natchez Trace Parkway in areas where fills had been constructed; that the results of the laboratory tests indicate that the soils encountered in these fills were either A-4 soils with a group index of 8 or A-6 soils with a group index of either 8 or 11; and that five of the samples tested classified as A-6 soils and two of the samples tested classified as A-4 soils.¹⁰⁶

¹⁰² Five of the borings were taken on project 3T1. In his testimony, Mr. Caldwell appeared to relate the taking of samples from an adjacent project to the issuance of Change Order No. 7, dated June 8, 1965 (Tr. 371).

In pertinent part Change Order No. 7 reads: "The requirements for material furnished under Item 102(5), Borrow excavation, Case 2, are hereby changed to the following specifications, for the embankment north of Little Bayou Pierre, exclusive of the special backfill between the wingwalls: 'Material furnished under Item 102(5), Borrow excavation, Case 2, shall have a group index of not more than 12 as defined in AASHTO Specifications, M-145.' " (Appeal File, Volume II, Directives and Change Orders)

¹⁰³ The following conclusions are stated at page 3 of the report:

"The preponderance of material encountered in the borrow pit area is of loessial origin varying from slightly clayey silts to silty clays. Based on the tests made for this report, 50 per cent of these materials would classify as A-4 soils with a group index of 8, or less, 33 per cent would classify as A-6 soils with a group index of 9, or less, and about 17 per cent would classify as A-7 soils.

"Assuming that the samples of in-place fill material taken at various locations along the

Footnote continued on next page.

¹⁰² Tr. 764-775. Upon cross-examination Mr. Banks acknowledged that none of the soil samples reported on in Government Exhibit I show an A-7 classification below six feet (Tr. 823). Banks had previously testified that soils classified as A-7 do not mix well (Tr. 779).

¹⁰³ Mr. Roger C. Lind testified as to his qualifications and his participation in the preparation of the report introduced in evidence as Appellant's Exhibit No. 9 (Tr. 826-28). He was not cross-examined by the Government.

¹⁰⁴ The results of the Government's testing of the duplicate samples are set forth in Government Exhibit N. In comparing the test results obtained in the division laboratory with those reported in Appellant's Exhibit No. 9, Mr. Banks stated that generally the classification by Mr. Lind were of a higher group which he noted lay largely in the determination of the liquid limit. He attributed the differences as probably due to one of the liquid limit devices being slightly out of adjustment (Tr. 776-77).

Mr. Banks identified Government Exhibit N as reflecting the results obtained by the division laboratory in testing samples submitted to the District Office by Mr. Douglas B. Flick who had accompanied Mr. Caldwell when the borings were made in September of 1970.¹⁰⁷ Responding to an inquiry from Government counsel as to the significance of these test borings that were taken up and down the Parkway as represented by Appellant's Exhibit 9 and Government Exhibit N, Mr. Banks stated that in his opinion they had no significance and were not pertinent (Tr. 777-78). Continuing the colloquy he gave the following basis for his opinion:

A. Most of them were taken on another project, and the sample or samples that were taken on Project 3T3 showed A-4 classification.¹⁰⁸ The ones that were taken on the other project met the specifications for that project. So I can't

see that there is any significance whatsoever to it. (Tr. 778)¹⁰⁹

We note that the conclusions of the Ware Lind report (Appellant's Exhibit 9) make no distinction between the samples taken on Project 3T3 and those taken on Project 3T1.¹¹⁰ We also note that all five of the samples tested from the borings taken on Project 3T1 were classified as A-6 in the Summary of Test Results given at Plate 6 of Appellant's Exhibit 9.

Although Mr. Rushing acknowledged that the resident engineer's actions in refusing to approve pit No. 2 as a source of borrow had a foundation in the specifications,¹¹¹ he expressed some doubt as to the reliability of the soil classifications reported in the results of the mid-October 1963 tests (Government Exhibit I).¹¹² The refusal to permit

Continued from previous page.

project are representative, approximately 71 per cent of these fill soils were found to consist of A-6 soils with a group index varying between 8 and 11, and about 29 per cent of the soils were found to consist of A-4 soils with a group index of 8.

"Based on the information available for this study, it is our opinion that the soils in the borrow pit area are generally similar to samples of in-place fill soils taken between Station 416+00 and Station 603+00. From an engineering standpoint, it is our further opinion that soils in the borrow area are at least as suitable for fill material as those which were actually used at the locations which were examined."

¹⁰⁷ See note 104, *supra*.

¹⁰⁸ The composite samples for Borings No. 2, 3 and 4 were classified as Group A-6, Group A-4 and group A-4, respectively in the Summary of Test Results set forth in Plate No. 6 to Appellant's Exhibit 9. The Ware Lind report states at page 2:

"Results of the tests indicate that the natural soils occurring in the borrow pit area can be classified generally in group A-4 or A-6 * * *." (Appellant's Exhibit 9.)

¹⁰⁹ In the course of further questioning Mr. Banks identified Samples 5 through 9 as having been taken on Project 3T1 (Tr. 778). This corresponds to Mr. Caldwell's testimony (Tr. 371).

¹¹⁰ Note 106, *supra*. All five samples taken on Project 3T1 were in-place fill material (Tr. 371-72). In the second paragraph of the report's conclusions (note 106, *supra*), a stated assumption is that "the samples of in-place fill material taken at various locations along the project are representative." (Italics supplied.) The same assumption is reflected in the third paragraph of the report's conclusions.

¹¹¹ Tr. 878-80. In responding to an inquiry by the hearing officer he stated:

"* * * we were discussing this some time in November after we began work * * * on hindsight I would say that we should have pursued it further. But at the particular time, I was convinced that there was not any need for it, that it just wouldn't do any good. * * * there was no doubt that he was quoting the letter of the specifications. He had that to back him up." (Tr. 878)

¹¹² "* * * I'm no soils expert, but they indicate to me that all these borings are in a real close proximity of one another. I'm talk-

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the use of pit No. 2 was regarded as an important matter and was discussed with Mr. Caldwell at the time. The possibility of going to see the district engineer, however, was not discussed. According to Mr. Rushing's recollection the only discussion he ever had with Mr. Caldwell involving the Government's refusal to approve proposed borrow pit No. 2 was the initial one in October or November of 1963.¹¹³ It is clear from Mr. Rushing's testimony that his judgment of the propriety of the resident engineer's action was considerably influenced by

ing about a pretty well confined area. * * * the difference between them within 200 foot or 300 foot * * * I think the methods used, the results you get from these methods are highly erratic, just because I don't see how in this confined area you can get this many results from zero to eight feet and zero to four feet and zero or 10 to 20 feet * * *." (Tr. 867)

Government witness Banks (who had had extensive experience with soils) testified, however, that in any area where you are dealing with soil, you are apt to run into a very heterogeneous material (Tr. 797). In cross-examination on rebuttal he characterized the loessial material in pit No. 2 as wind born after which he stated:

"A. The depth of the deposit will vary more with your wind blown material because the unevenness of the surface on which it is deposited. * * *" (Tr. 1018)

¹¹³ Tr. 880. Since work on a large fill where much of the borrow material from pit No. 2 was slated to go did not begin until February 1, 1964, there was considerable opportunity time-wise to secure review of the resident engineer's decision even if the recommended procedure of submitting a letter to the prime contractor for transmission to the district engineer had been followed (note 34, *supra*; Tr. 488). The failure to discuss the matter further with Mr. Caldwell may have been attributable in part to the fact that throughout the life of the contract Mr. Caldwell was only on the job four times. Two of these visits were before the resident engineer's refusal to approve borrow pit No. 2 (Tr. 905-06, 1032).

the fact that deviation from the specification requirements for Borrow, Case 2 had been granted, on other projects, as he later learned.¹¹⁴

Throughout his testimony Mr. Rushing asserted that the resident engineer had said that he would not forward a letter requesting a deviation from the specifications to the district office for the stated reason that they did not have the authority to waive the specification requirements either.¹¹⁵ The following exchange took place between Mr. Rushing and the hearing official:

"Q. * * * I would like to be clear on the conversation with Mr. Herrin, particularly * * * as to the point of whether he said it would be useless to forward it because the district office didn't have authority or whether he said he wouldn't forward it.

"A. You might say both. He said he wouldn't forward it and the reason being that nobody in that office had the authority to change it, change the specifications. And that's very nearly a direct quote." (Tr. 868)¹¹⁶

¹¹⁴ " * * * other projects had been granted this. Had they not been granted, it would have certainly made me view it in a different light. * * *" (Tr. 879)

The only other project identified as having been granted a deviation was the adjacent project 3T1.

¹¹⁵ Tr. 865-68, 876. Mr. Banks who had been District Engineer since September 1, 1964, and Assistant District Engineer prior to that time (note 32, *supra*) testified that the District Engineer did have authority to issue change orders and would have had authority to overrule his subordinate, the resident engineer, at any time (Tr. 998).

¹¹⁶ Mr. Jordan was assistant resident engineer from July of 1963 to February or March of 1965, and worked closely with Mr. Herrin throughout that period. Mr. Jordan testified that he had never questioned a decision made by Mr. Herrin (Tr. 514). Mr. Jordan acknowledged on cross-examination that he was not present at all the conversations between Mr.

Footnote continued on next page.

The night before the hearing commenced in October of 1970, Mr. Caldwell made a comparison of the relative advantages of proposed pit No. 2 over pit No. 1 (the great bulk of the borrow material slated to be obtained from pit No. 2 was obtained from pit No. 1). The following day this testimony was presented at the hearing (Tr. 333-38). Government witnesses, notably Banks, questioned some of the findings made by Mr. Caldwell. With one exception hereinafter noted, we do not think any useful purpose would be served by reviewing the testimony of the parties respecting the alleged advantages of pit No. 2 over pit No. 1. Assuming that pit No. 2 was clearly superior in all the respects claimed by Mr. Caldwell, there is no indication that any of the arguments advanced (except possibly that related to the question of reasonable haul distance) were presented to the resident engineer or anyone else in the Government prior to the time of the hearing. Indeed, considering Mr. Rushing's rather limited experience in the construction industry up to November of 1963, particularly with respect to a position involving managerial re-

sponsibility,¹¹⁷ it is at least doubtful that he could have prepared such a comparison reflecting as it did Mr. Caldwell's 30 years' experience in construction.¹¹⁸

The parties were also apart on the question of what constituted a reasonable haul distance. To Mr. Caldwell a reasonable haul distance with the equipment he had on project 3T3 would not have exceeded 3,000 feet (Tr. 360-61, 892-93). To Mr. Jordan a reasonable haul distance would involve a mile or less (Tr. 519). The question is of considerable importance because the Government justifies the relaxation of the specification requirements for borrow excavation, Case 2 reflected in Change Order No. 7 (note 105, *supra*), and concerning project 3T1 on the grounds that to have required adherence to the specifications in those instances would have involved an unreasonable haul distance.

¹¹⁷ There is no indication that prior to Project 3T3 Mr. Rushing had been a contractor's superintendent. Testifying in the companion appeal involving Project 3P2, Mr. Rushing summarized his experience by saying that he had been associated with the construction business since 1958, in various phases of construction (Tr. 227-28, 246). Mr. Rushing's prior experience on a Bureau of Public Road's contract was in the capacity of project engineer for a bridge building contractor (Tr. 870-71).

¹¹⁸ Tr. 337, 901. It was sometimes hard to tell whether Mr. Caldwell was testifying as to what had been done on Project 3T3 or what he had done on some other jobs. Upon direct examination on rebuttal he testified as if discs had been available for drying out material (Tr. 1030). Mr. Jordan stated, however, that very little drying had been done on Project 3T3; that he had never seen a disc being used; and that the project equipment register didn't show a disc ever being on the job (Tr. 1034-36).

Continued from previous page.

Herrin and contractor personnel (Tr. 983-84). Based upon virtually a day to day association, however, Mr. Jordan found that the statement attributed to Mr. Herrin about refusing to forward a letter to the District Office concerned with borrow from pit No. 2 would not be consistent with Mr. Herrin's personality and character (Tr. 989-90).

In Mr. Jordan's view the question presented in Change Order No. 7 was entirely different than that involved in the approval of proposed borrow pit No. 2. Insistence upon adherence to the specification requirements would have entailed a haul of six or eight miles according to Jordan (Tr. 515-19). After noting that pit No. 1 was located south of Little Bayou Pierre and that the area of construction was north of Little Bayou Pierre, Government witness Banks stated that to have used material from pit No. 1 north of Little Bayou Pierre would have necessitated building haul road across the bayou which was risky because "you never know when the bayou" would "rise up * * * and wash out everything you have." The other alternative involved a long haul through Port Gibson for a very small quantity of material (Tr. 780-82).

The testimony by the Government was not disputed by the appellant. In his testimony Mr. Caldwell stated that Change Order No. 7 involved 5,275 yards of material (Tr. 350).¹¹⁹ He also stated that the reasons for issuing Change Order No. 7 were even more applicable to the situation involved in proposed borrow pit No. 2 (Tr. 359-60).

¹¹⁹ According to Mr. Caldwell the contractor on Project 3T1 completed the work covered by Change Order No. 7 and was reimbursed by Caldwell from the proceeds received from the Government (Tr. 349-50). According to both Mr. Caldwell and Mr. Banks other contract items of work were deleted from Project 3T3 and were added to Project 3T1 (Tr. 350, 823-24).

This view of the matter entirely ignores the fact that the contractor made a written request for waiver of the specification requirements for the small quantity of borrow material involved in Change Order No. 7 but made no such request with respect to borrow materials from proposed pit No. 2.¹²⁰ Also ignored is the undisputed testimony that a haul distance of at least six miles would have been involved if Change Order No. 7 had not been issued, as contrasted with Mr. Caldwell's own estimate that the average haul distance resulting from the Government's refusal to approve proposed pit No. 2 was 4,400 feet.¹²¹

Detailed information concerning project 3T1 is not contained in the record. The most comprehensive testimony concerning project 3T1 was given by Government witness Jordan who—testifying on direct examination with respect to the circumstances surrounding the issuance of Change Order No. 7—stated:

* * * during this same time, Project 3T1 which abutted this Project 3T3 to the north was under construction, and the contractor and the engineering force

¹²⁰ Tr. 349, 515-19; note 101, *supra*.

¹²¹ Tr. 515-19, 782, 349-51. Comparing the two situations on direct examination Government witness Jordan stated:

"* * * this was done through the district office and the specifications for the material in this 180 foot fill was changed to meet the specifications for Project 3T1. So, it was an entirely different situation than what occurred at proposed pit no. 2, being that there was no A-4 or better material that was suitable or available in this particular area." (Tr. 518)

on that project had searched for suitable case 2 borrow material which would meet the classification of A-4 Classification or better to no avail. They had determined that there was no material just north of here. I don't know just exactly how far north this was,¹²² but I do know that in this particular area that they couldn't obtain it. And I do know that since there was no material available within a reasonable distance that they obtained from the district office a waiver on the specifications and were allowed to use material which did not meet the original specifications, but did meet some revised specifications.¹²³

The record does not disclose when the deviation from the specification requirements for borrow excavation Case 2 was obtained by the contractor for project 3T1;¹²⁴ nor does it disclose what information having a bearing on the question of reasonable haul distance was furnished to

the district office in support of the request for deviation by the project 3T1 contractor.

Mr. Caldwell offered a number of reasons for not contesting the decision of the resident engineer respecting proposed borrow pit No. 2 at the time the decision was rendered. In summary these were: (i) that in 30 years of construction experience he had never written a letter without first consulting with the resident engineer or the man with whom he had to deal directly; (ii) that he had never gone over the head of the man he had to work with at the rejection of an idea; (iii) that he had always tried to work things out verbally; (iv) that to have spoken to Mr. Herrin when he saw him would not only have been getting between him and Mr. Rushing but would have been an affront¹²⁵ to Mr. Herrin as well, considering the emphatic terms in which the refusal to approve the pit has had been stated, and (v) that they were resigned¹²⁶

¹²² In the course of a colloquy with the hearing official, Mr. Caldwell acknowledged that he was without any detailed information as to project 3T1, stating:

"Well, I didn't figure out his mass for his borrow because I didn't have his set of plans * * *." (Tr. 350-51)

¹²³ Tr. 517-18. Upon cross-examination Mr. Banks stated that project 3T1 had the same classification for borrow Case 2 initially but that it was changed to a group index of 12 (Tr. 811, 823). The following exchange took place between Mr. Banks and appellant's counsel:

"Q. Now, a group index of 12 would be an A-5, an A-6 or an A-7?

"A. Under certain circumstances, but it would be impossible to have a group index of 12 for an A-7 in this particular area. I say it would be impossible. Let me clarify that. It would be highly unlikely. It could occur." (Tr. 815)

The Board notes that the group index permitted under Change Order No. 7 (note 105, *supra*) for Borrow excavation, Case 2, was "not more than 12."

¹²⁴ The testimony does show that the work deleted from project 3T3 and added to project 3T1 was not completed until the year following the completion of project 3T3. (Tr. 349-50, 824)

¹²⁵ See *The Jordan Company*, ASBCA No. 10874 (December 15, 1966), 66-2 BCA par. 6030, in which in the course of denying one of the claims presented, the Board stated at 27,869-70:

"* * * We conclude that the appellant, after complaining, proceeded without further protest either under the assumption that the resident engineer's directions were within the requirements of the contract or that he did not wish to endanger relations with the inspection force by making an issue of the matter. In either event, appellant's compliance with these requirements * * * must be considered as having been voluntary and the transaction was not a change within the meaning of the Changes article. * * *"

¹²⁶ *The Jordan Company*, note 125, *supra*, at 27,869: ("Where instructions given or requirements imposed orally by the Government representative are an expression of that representative's concept of the requirements of

to the fact that they would have to complete the work without pit No. 2 (Tr. 900-08).

As the above-cited testimony indicates and as the record otherwise confirms, Mr. Rushing was largely given a free hand in directing the grading subcontractor's operations on project 3T3.¹²⁷ The record also clearly indicates that, insofar as the prosecution of claims was concerned, Mr. Rushing was either unaware of, or failed to adhere to, the philosophy outlined by Mr. Caldwell in his testimony.¹²⁸ Actions taken by Mr. Rushing in November of 1963 (*i.e.*, the same month in which he was notified of the disapproval of proposed pit No. 2 as a source of borrow), show that he was tenacious in seeking review by higher authority of the refusal by the resident engineer to permit the use of a sheep's foot roller.¹²⁹ With

respect to the sheep's foot roller incident, there is nothing to suggest that Mr. Rushing was opposed to writing letters seeking review of decisions by subordinates, or otherwise contesting decisions with which he disagreed. The same attitude was displayed by Mr. Rushing with respect to the resident engineer's directions to him not to excavate the bluff south of U.S. Highway 61 and not haul across U.S. 61 at night.¹³⁰

The record suggests that the apparently inconsistent course followed by Mr. Rushing with respect to the borrow claim may be attributable to the fact that at the time the resident engineer refused to approve the use of proposed borrow pit No. 2 in November of 1963, Mr. Rushing considered Mr. Herrin's decision to be well-founded and that his view of the matter only changed when incident to the grant of the contractor's request for a deviation from the specification requirements for borrow in June of 1965 (Change Order No. 7), he learned that at an earlier time the contractor on project 3T1 had been granted a deviation from the specification requirements for Case 2 borrow. Mr. Rushing's own testimony lends strong support to this view. His testimony also shows that the position of the resident engineer was simply that he would not accept material from the pit unless it met the requirements of the specifications for borrow excavation, Case 2 (*i.e.*, he was not refusing to permit

the contract, the contractor must protest these instructions, if he expects to claim successfully that these oral instructions and/or impositions amount to a constructive change order. *J. A. Ross & Company v. The United States*, 126 Ct. Cls. 323, 372 and *DuBois Construction Corporation v. The United States*, 120 Ct. Cls. 139, 168.").

¹²⁷ Notes 84 and 113, *supra*; Tr. 905-06, 1032.

¹²⁸ Notes 37 and 84, *supra*. The following colloquy occurred in rebuttal cross-examination of Mr. Caldwell about drying work:

"Q. You are now testifying as to the standard practice that was maintained on this job?

"A. I am testifying as to the standard practice of this company, not of this job." (Tr. 1032)

¹²⁹ Notes 31 to 37, *supra*. Comparing the two situations upon direct examination Mr. Jordan stated:

"In my opinion, the matter of the fill probably would involve more time and money and effort than the situation of * * * having to move another roller on the job to replace one. But evidently the thought at the time * * * was that the pit wasn't worth the trouble to try to go over the project personnel's head." (Tr. 488-89)

¹³⁰ Note 84, *supra*.

the contractor to develop the pit).¹³¹ Rushing did not request the Government to run tests of materials obtained from borings taken in different locations but still in the vicinity of proposed pit No. 2. While at the hearing Rushing indicated a lack of confidence in the methods used to obtain the material used in the October 1963 tests (*i.e.*, auger borings),¹³² there is no evidence that he requested the Government to use a different method or requested permission of the Government to have experts retained by Caldwell conduct their own tests, as Caldwell did in September of 1970 (Appellant's Exhibit 9). Upon direct examination Government witness Jordan commented upon the courses of action available to Caldwell when notified that proposed pit No. 2 had not been approved.¹³³ He also recalled having discussed with Rushing the possibility that the material in proposed pit No. 2 below six to 10 feet met the requirements of the specifications.¹³⁴

¹³¹ Notes 100 and 111, *supra*.

¹³² Note 112, *supra*.

¹³³ "A. Well, he had three alternatives. No. 1, he could have stripped the overburden off this proposed pit No. 2 and gotten down to a point where we had good indications that there was acceptable material. No. 2, he could have performed some exploration in adjacent areas that were close to this proposed pit No. 2, and he could have made borings and tried to determine if there was an area in this general location where there was acceptable material. Or, three, he could have gone to another location which was already approved and hauled his material from there, and this is what he chose to do. * * *" (Tr. 492)

¹³⁴ In the course of a colloquy with the hearing official Mr. Jordan stated:

"* * * we had good indications that the material from six to ten feet down and below was capable of meeting the specifications. * * * I believe that Mr. Rushing and I had dis-

Another possibility is that Mr. Rushing was deterred from contesting the resident engineer's decision at the time because of what Mr. Rushing testified to, namely, Mr. Herrin had said that he would refuse to forward a letter to the district office requesting approval of proposed pit No. 2 for Case 2 borrow because that office did not have the authority to grant such a request. Since Mr. Herrin was deceased at the time of the hearing, we are without the benefit of his views concerning the reported conversation. There are a number of reasons, however, why we do not accept Mr. Rushing's testimony on this particular question.

At the outset we take note of the fact that Mr. Rushing's version of the conversation was not presented by Mr. Caldwell at the conference held with Government representatives on April 20, 1966,¹³⁵ to discuss

cussed, perhaps not in a formal manner, but on the project the possibility of the soil beneath this overburden being acceptable. And I can't remember whether he said it was uneconomical to strip this overburden or not. But evidently he either thought it was uneconomical or he thought that the risk was too great to strip it and possibly the material below not meet it, although we had indications that it would meet specifications." (Tr. 491-92)

¹³⁵ Appellant's Exhibit No. 4, IBCA-814-12-69, Government memorandum dated April 25, 1966. At page 4 of the memorandum the following statement appears:

"* * * Resident Engineer Herrin said that borings and tests indicated 5' to 12' stripping would be required before reaching material that would meet specifications. The material was quite stratified. He had discussed this with the contractor's superintendent Rushing who agreed at the time that the stripping requirements and anticipated water conditions would not make working the pit feasible."

In the companion appeal pertaining to project 3P2 Mr. Caldwell testified that the memorandum in question was "an awful accurate

various claims of Caldwell, even though the refusal of the resident engineer to approve proposed pit No. 2 was one of the claim matters discussed and even though Mr. Caldwell referred in his testimony to Mr. Herrin not wanting "any letter in there." (Tr. 907)

Based upon virtually a day to day association with Mr. Herrin from July of 1963 to February or March of 1965, Mr. Jordan considered the statement attributed to Mr. Herrin by Mr. Rushing to be inconsistent with Mr. Herrin's personality and character (Tr. 989-90). Lastly, we note that the evidence of record casts serious doubt upon the accuracy of Mr. Rushing's recollection of events which took place almost seven years before where, as here, there were no diary entries to aid his recollection.¹³⁶ That Mr. Rushing sometimes failed¹³⁷ to distinguish between related but different ideas is considered to be illustrated by the material variance between the testimony he gave as to the condition imposed by the telephone company for moving its line and the condition recorded contemporaneously in his diary for the date in question. We

also note the apparent discrepancy¹³⁸ between Mr. Rushing's testimony that he bid the job contemplating night work and what was recorded contemporaneously in the Government memorandum of the preconstruction conference that Mr. Rushing attended (note 20, *supra*). Finally, we note Mr. Rushing's inability to state with certainty so long after the event whether an extraordinary¹³⁹ happening he thought he had seen had in fact occurred. We do not wish to be understood as saying or implying that Mr. Rushing consciously misrepresented the gist of the conversation with Mr. Herrin to which he testified. It is rather a case of the Board refusing to accept Mr. Rushing's testimony that Mr. Herrin said he would not forward a letter to the District Office requesting approval of proposed pit No. 2 where, as here, (i) an exhibit offered in evidence by the appellant records Mr. Herrin as saying that proposed borrow pit No. 2 was discussed with Mr. Rushing "who agreed at the time that the stripping requirements and anticipated water conditions would not make working the pit feasible"¹⁴⁰ and (ii) other evidence of record casts serious doubt upon the accuracy of the unaided recollection of Mr. Rushing so long after the conversation to which he testified.

copy of my understanding of what transpired at the meeting." (Tr. 180-83) Although Mr. Caldwell took exception to matters included in and excluded from the memorandum (Tr. 101, 183), none of such exceptions were concerned with the statement attributed by Mr. Rushing to Mr. Herrin.

¹³⁶ Mr. Rushing testified that he kept no diary in 1963, and that he never had kept a "good" diary (Tr. 851).

¹³⁷ Note 51 and note 71, *supra*, and accompanying text.

¹³⁸ Tr. 268; note 20, *supra*.

¹³⁹ Note 66, *supra*.

¹⁴⁰ Note 135, *supra*.

Decision on use of proposed borrow pit No. 2

We now turn to an examination of the arguments advanced by the appellant in support of Claim C in the light of the evidence of record. At the outset we note that the requirements¹⁴¹ for Case 2 borrow excavation are set forth in the contract plans. In summary, the appellant's arguments are (i) the material in proposed borrow pit No. 2 met the requirements of the specifications; (ii) if the material did not meet the requirements of the specifications, the differences were negligible; (iii) to the extent there were differences between what was required by the terms of the specifications and the material contained in proposed pit No. 2, the specification requirements should have been modified in accordance with the provisions of Article 4.2 thereof; (iv) the refusal to permit the use of proposed pit No. 2 as a source of borrow contravenes a custom in the highway construction industry to permit regular borrow to be obtained from local materials suitably situated within a reasonable scraper haul of the areas in which the borrow is to be placed; and (v) prejudice to the Government, if any, resulting from the delay by the appellant in asserting the borrow claim was waived by the contract-

ing officer's action in considering the claim on the merits and the failure of the Government to raise the issue in its pleadings. Each of these contentions will be examined seriatim.

The contention that the material in proposed borrow pit No. 2 met the requirements of the specifications is clearly contrary to the evidence of record (Government Exhibit I). The appellant made no effort at the hearing to support this contention and at the April 20, 1966, conference, Mr. Caldwell acknowledged that borrow material from proposed pit No. 2 did not¹⁴² meet the requirements of the specifications.

The argument that the differences were negligible is hardly more tenable. Government witness Banks testified as to the basis for the soil classifications employed of A-1 through A-7. In connection therewith he stated:

The significance of the numerical sequence was such that as materials be-

¹⁴² Government memorandum of April 25, 1966, note 135, *supra*, p. 4 ("The contractor claimed that material from the nearby cut on the parkway was the same kind of material that was rejected for use from this borrow pit, and that since this cut material was used in the embankment, he felt the borrow pit material should have also been accepted even though it did not pass the specifications for borrow material."). Mr. Caldwell advanced the same argument at the hearing (Tr. 330).

Government witness Banks testified that in designing the Natchez Trace Parkway attempts were made to utilize cuts to make the fills wherever possible but that on nearly all borrow was necessary. He also testified (i) that generally speaking the material along the center line of project 3T3 was A-4; (ii) that no distinction was made in road design between borrow and unclassified excavation; and (iii) that a contractor would normally remove the excavation first since it gives him a better haul road and eliminate the possibility of waste excavation (Tr. 784, 796-98).

¹⁴¹ "Borrow excavation, Case 2, shall meet the requirements for soils of the A-1, A-2, A-3 or A-4 groups, AASHTO M 145 classifications." (Appeal File, Volume I, Contract Plans, Sheet 2 of 70 Sheets.)

Mr. Caldwell did not recall whether he was aware of this provision prior to the time of bidding (Tr. 330).

come progressively less suitable for roadway construction, the number increases. (Tr. 770)¹⁴³

The appellant offered no countervailing testimony; nor did it attempt to impugn the testimony so offered by Mr. Banks. The fact that the appellant may not have considered that the deviation from the specifications involved would significantly affect the quality of the roadway construction is not controlling, since the Government is entitled to full contract compliance.¹⁴⁴

The assertion that Article 4.2 of the Standard Specifications (FP-61) required the Government to accede to the contractor's request for approval of proposed pit No. 2 is also considered to be without merit. When the full text of the Article (note 10, *supra*) is read, it is clear that the provision was inserted as a means of establishing in advance of contracting a relationship between the variation in quantity provision and the standard changes clause, while making clear that a substantial change in the character of the work to be performed under the contract was not to be governed by the contract pay items. We note that the appellant is not seeking an equitable adjustment based on the contention that the work it was required to perform was in excess of the variation in quantity specified in the Article and we are unable to per-

ceive why requiring the contractor to comply with the requirements for borrow specified in the contract would constitute "a substantial change in the character of the work to be performed under a contract pay item or items that materially increases or decreases the cost of its performance."¹⁴⁵

Concerning the alleged custom in the highway construction industry which would permit the contractor to use as regular borrow any material located within a reasonable scraper haul from the area where it is to be placed, we deem it sufficient to note the recent Court of Claims decision in which it was held that trade practices cannot be relied upon to vary the terms of an unambiguous contract provision.¹⁴⁶ We therefore do not reach the question of whether the evidence adduced at the hearing was sufficient to meet the standard of proof required¹⁴⁷

¹⁴⁵ Note 10, *supra*; *Morrison-Knudsen Co. v. United States*, note 95, *supra*.

¹⁴⁶ See *WRB Corp., et al. v. United States*, 183 Ct. Cl. 409 (1968), in which at page 436 the Court stated:

"Although the evidence in the record indicates that masonite is the usual and customary material that is used for doors on paint-grade cabinets, and that a masonite cabinet door has equal utility to a cabinet door made of wood, the pertinent contract specification in this case plainly required that the cabinet doors be made of plywood or solid stock. This was the Government's prerogative, and it was a provision to which the plaintiff had agreed when it entered into the contract with the Government. A trade practice in the building industry of using masonite doors on paint-grade cabinets cannot properly be permitted to overcome an unambiguous contract provision (citations omitted)."

¹⁴⁷ See *Eder Electric Co. v. United States*, 205 F. Supp. 305 (1962), in which the Court defined a trade custom as one established by evidence "so clear, uncontradictory, and distinct so as to leave no doubt as to its nature * * *."

¹⁴³ Tests in the borrow pit area disclosed soils classified as high as A-7 (Government Exhibit I and Appellant's Exhibit No. 9). Mr. Banks also referred in his testimony to the poor mixing qualities of soils classified as A-7 (Tr. 779, 823).

¹⁴⁴ *Red Circle Corp. v. United States*, 185 Ct. Cl. 1, 8 (1968).

to establish the existence of the custom in the highway construction industry claimed by the appellant.

With respect to the effect to be given to the delay by the appellant in asserting the borrow claim, the appellant's posthearing brief at page 9 asserts that no prejudice to the Government resulted from the delayed submission but that if prejudice did occur, it has been waived by the Government's actions in considering the claim on the merits, citing *Dittmore-Freimuth Corp. v. United States*, 182 Ct. Cl. 507 (1968) and other cases. There is no doubt that consideration of a claim on the merits has the effect of waiving the jurisdictional question presented by a contractor's failure to adhere to contract specified notice requirements, as *Dittmore-Freimuth* holds and as this Board has held on many occasions.¹⁴⁸ That is not to say that delay in the filing of a claim does not continue to be a factor in evaluating its merits.¹⁴⁹

While we have thought it appropriate to address ourselves to the principal contentions made by the appellant with respect to Claim C, we do not consider that resolving one or more of the questions presented in the appellant's favor would have altered the conclusion we reached

¹⁴⁸ See, e.g., *Larsen-Meyer Construction Co., IBCA-85* (November 24, 1958), 65 I.D. 463, 465, 58-2 BCA par. 1987 at 8,235.

¹⁴⁹ *Dittmore-Freimuth* cited in the text held at 528:

"It is also significant that plaintiff had no intention of filing a claim at the time the expense was incurred. That admission leads to the conclusion that this item of damage is nothing but an after-the-fact issue. * * *"
See, also, *John R. Chrisman & Associates*, note 13, *supra*.

on the borrow claim. This is because we view the central question pertaining to Claim C as: what reason, if any, did the appellant have for failing to follow known and established procedures for securing a review of the decision of the resident engineer when he refused to permit the use of proposed borrow pit No. 2 as a source of borrow on the basis of the results of tests reported to him? The appellant has offered no adequate explanation for its failure to appeal the decision of the resident engineer to the district engineer in November of 1963 (when it was notified that proposed pit No. 2 was not approved) or within a reasonable time thereafter but in any event prior to the time it placed the borrow forming the basis of the present claim.

Since no exigency was present which precluded the appellant from seeking review of the resident engineer's decision before allegedly incurring the costs forming the basis of the borrow claim and since at the time the claim was presented options contemplated by adherence to established procedures had been foreclosed to the Government, the claim is regarded as without merit and is therefore denied.¹⁵⁰

Claim D—Stretchout costs and other costs attributed to Government delay

Upon direct examination Mr. Caldwell offered the following description of Claim D:

¹⁵⁰ See *Moyer Brothers v. United States*, 156 Ct. Cl. 120 (1962); *The Jordan Company*, note 125, *supra*.

July 31, 1972

A. It's a by-product of the previous claims. In general it encompasses the lost time and use for machines held up in these claims, not operating because when they are operating, why we got paid for what they did, but the lost time, the delay in our keeping this spread there that long, the stretching out of our total equipment cost to this job is what it amounts to in part. That is part of it.

The fact that we had to redo work—hold a job open and grade it over a winter and had to redo the next spring what we had done the previous fall and other related overhead costs of carrying the job over the winter is also embodied in this D claim. * * * (Tr. 379)¹⁵¹

Since without exception the costs included in the claim are delay costs allegedly resulting from the Government's actions with respect to Claims A, B and C and since the contract includes no pay-for-delay¹⁵² provision, the entire claim is outside the scope of our jurisdiction¹⁵³ and is therefore dismissed.¹⁵⁴

¹⁵¹ The items included in Claim D are enumerated in the text accompanying footnote 12 with a breakdown of the costs involved being set forth in the footnote.

¹⁵² Notes 5 and 68, *supra*.

¹⁵³ Note 69, *supra*.

¹⁵⁴ In addition to the \$222,160.20 claimed for extra work allegedly involved in Claims A through D, the appellant also claims an allowance for overhead (10%) and profit (10%), making a request for equitable adjustment in the total amount of \$268,813.84 (Appellant's Complaint, p. 6). Since we have either dismissed or denied Claims A through D, there is no basis for allowing any part of overhead costs and profit claimed thereon amounting to \$46,653.64.

We also note that even if Claim D were not subject to dismissal on jurisdictional grounds, no part thereof would be allowable, since the claim is predicated upon the allowance of Claims A, B and C, "or any two of these items." (Appellant's Complaint, p. 4)

Claim for 150-day time extension

In its complaint appellant requested a 150-day time extension predicated upon claimed excusable causes of delay pertaining to Claims A, B and C of 60, 20 and 70 days, respectively. The appellant also contests the propriety of the liquidated damages assessed in the amount of \$12,600 for 63 days' delay in performing the contract.

With respect to the requested time extension, we note that the reasons assigned for denying the Claim C request for compensation apply with equal validity to the Claim C request for a 70-day time extension. Remaining for consideration is the 80-day¹⁵⁵ time extension sought for Claims A and B.

We have previously noted that the telephone company imposed as a condition to moving its lines that the paper work be approved (note 51, *supra*). Also noted was the statement by Government counsel indicating that a question existed as to whether the approval required was that of the company or that of the Government (note 71, *supra*). While the record before us contains no definitive answer, we consider it to be virtually certain that it was

¹⁵⁵ Since the appellant has indicated that the time extension requested for each of the two claims represented a wholly arbitrary allocation between them for the total estimated time involved of 80 days (note 8, *supra*), and since the evidence shows the two claims to be closely interrelated (note 52, *supra*), we have combined them for the purpose of determining the time extension to which the appellant may be entitled.

the latter. In this connection, we note that it would be highly incongruous for an official of the telephone company to tell a Government representative after months of delay that the company would not move its lines until the company had approved the paper work. We also note that approval of the paper work could be highly significant if the Government were the party whose approval was required since it could represent the difference between being paid and not being paid for the work performed.

Lastly, we note Mr. Rushing's persistent allegation that the telephone company refused to move its line until it was paid. While in terms of normal business practice it seems highly unlikely that the telephone company would insist upon being paid in advance before it performed work for the Government, it would be an ordinary exercise of business judgment for the company to insist upon a written order being issued before it proceeded with the work so that when the poles were moved the company could invoice and be paid.

We do not know that this is in fact what occurred. We do know, however, that the matter was one as to which the Government had access to more information than did the appellant and had had ample time to develop and secure approval of any paper work required.¹⁵⁶ The

Government has failed to provide information apparently within its possession (or presumably accessible to it) having a direct bearing on the propriety of liquidated damages assessed for delayed performance. In the absence of such information, no adequate basis exists for determining the extent to which the Government contributed to the delay in question. For these reasons, we conclude that the appellant is entitled¹⁵⁷ to have the contract time extended by the 63 days involved in the assessment or to October 8, 1965.¹⁵⁸

would have been sufficient time to work out the details for having the poles removed. Allowing 30 days from the date the order was received for the telephone company to move the lines, the work should have been accomplished about the time that the clearing work was substantially completed in mid-November of 1963.

¹⁵⁷ *Tobe Deutschmann Laboratories, NASA* BCA No: 73 (February 25, 1966), 66-1 BCA par. 5413 at 25,413:

"* * * In the present case, the delays attributable to the parties are not contemporaneous, but it is apparent that both delays contributed 'substantially to the failure of timely delivery. There is no satisfactory way to apportion the degree to which each delay contributed to the failure to meet the delivery deadline. In such a case, we believe neither party is logically entitled to blame the other for the slippage, and accordingly the Government's default action should not stand. See also *Commerce International Company v. United States*, 338 F. 2d 81 (Ct. Cl. 1964), where the Court, unable to separate contractor from Government delays, applied the rule 'that there can be no recovery where the defendant's delay is concurrent or intertwined with other delays.' *Id.* at 90. In the present Appeal, it is the Government, not Appellant, which by its default action, has sought to shift the loss arising from the inseparable delays. Appellant is seeking merely to establish that he is not legally responsible for the failure to meet the delivery date and, under the above reasoning, we believe he has succeeded." See also *Wharton-Green & Co., Inc. v. United States*, 86 Ct. Cl. 100, 108 (1937).

¹⁵⁸ In so concluding we do not reach the question of whether on the basis of the evi-

¹⁵⁶ There was considerable discussion of moving telephone lines on project 3P2 as early as the time of the preconstruction conference on July 11, 1963 (Note 21, *supra*). We consider that 90 days from that date

Conclusions

1. Claims A and D are dismissed.
2. Claim B is dismissed insofar as it involved a claim for delay in providing construction stakes and is otherwise denied.
3. Claim C is denied.
4. The claim for time extension is approved to the extent of 63 days.

WILLIAM F. MCGRAW, *Chairman.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

GLENN MUNSEY, EARNEST SCOTT,
 and ARNOLD SCOTT

v.

SMITTY BAKER COAL COMPANY,
 INC.

1 IBMA 144

Decided August 8, 1972

Appeal from decision of William Fauver, Departmental Hearing Examiner, reinstating three miners pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

dence of record the contract was completed substantially earlier than October 8, 1965. See the testimony of Government witnesses Jordan and Banks reported at Tr. 730-32, 805-06.

We also note that the time extension, if any, to which the appellant may have been entitled by reason of any Government delay in providing construction stakes is considered to be subsumed in the time extension granted.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Jurisdiction

Subsection 110(b) of the Act limits the jurisdiction of the Secretary to the protection only of those activities specified in that subsection and does not provide relief for general labor grievances.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Elements of Proof

The elements of proof of a violation of subsection 110(b) (1) (A) of the Act are: (1) that a miner has reported to the Secretary or an authorized representative of the Secretary an alleged violation or danger in a coal mine; (2) that after such reporting occurred, such miner was discharged from his employment; and (3) that such discharge was motivated by reason of such reporting and not for some other reason.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Burden of Proof

It must be proved by a preponderance of the evidence that an operator who has discharged a miner knew or believed that such miner had reported or instigated reports of alleged violations or dangers to the Secretary or his authorized representative, in order to establish a violation of subsection 110(b) (1) (A) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Inferences

A finding pertaining to an operator's knowledge or belief that a miner has engaged in activities protected by subsection 110(b) (1) of the Act may be based on inferences, but such inferences must be properly drawn from established facts of record and in accordance with the

fundamental principles of the law of Evidence relating to inferences.

APPEARANCES: Logan E. Patterson, Esquire, for appellant, Smitty Baker Coal Co., Inc.; Edward L. Carey, Esquire, Willard P. Owens, Esquire, Charles L. Widman, Esquire, for appellees, Glenn Munsey, Earnest Scott, and Arnold Scott.

OPINION BY MR. ROGERS

**INTERIOR BOARD OF MINE
OPERATIONS APPEALS**

I.

*Factual and Procedural
Background*

Glenn Munsey, Earnest Scott, and Arnold Scott (applicants) were employed by Smitty Baker Coal Company (respondent). They were part of a seven-man crew working in one of two operating sections of Mine No. 1. The three men worked as jacksetters and timbersetters in connection with the operation of a Wilcox continuous miner, a double-auger mining machine.¹

On April 15, 1971, the applicants were at their jobs when a large rock fell from the mine roof. The rock fell across the augers of the Wilcox miner. After the fall, the crew withdrew about 40 feet out of the working area to a heavily timbered area. The crew foreman, Clement Kempton, phoned the mine superintend-

ent, Frank Cochran, and told him of the fall. Upon Cochran's instructions, Kempton phoned the other section foreman, Fred Coeburn, and asked Coeburn to inspect the section of the fall.

Coeburn arrived at the applicant's section, and along with a mine safety committeeman,² Earl Stapleton, removed the rock and inspected the roof. Both Stapleton and Coeburn concluded that the roof was sufficiently safe, and the crew returned to work. A few minutes after recommencing work, the operator of the continuous miner thought that he saw the roof dribbling, *i.e.*, debris falling from the roof which might indicate that the roof is loose and a fall imminent.³ He signaled this danger to the crew. Some of the crew remained at the working area, but the applicants withdrew to the heavily timbered area. Coeburn and Stapleton retested the roof and again concluded that it was safe. Nonetheless, the

² Mine safety committeeman is a United Mine Workers of America (UMWA) position held by a man employed at the mine. A committeeman's powers are described in Applicants' Exhibit 4, the National Bituminous Coal Wage Agreement of 1968, page 2, as follows:

"The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. *In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.*" (Italics added.)

³ The operator of the continuous miner later admitted that he was wrong about the dribble. Transcript of Hearing, p. 630-31 (hereinafter cited, "Tr. p. —").

¹ A description of the operation of the Wilcox continuous miner and the nature of the Applicants' work is contained in the examiner's decision at pages 6 and 7.

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applicants refused to return to work. They protested to the foreman that the roof was unsafe and that the loose portions should be taken down.

After some discussion, Coeburn told the applicants that they could set timbers if they did not want to return to their jobs. The applicants refused. Coeburn then told the applicants that if they were not going to work, they should leave the mine. Coeburn called the superintendent, Cochran, to inform him that he was sending the men from the mine.

The applicants left the mine and returned to the surface. While eating their lunches, they saw Cochran coming out of the mine returning from the site of the rock fall. Cochran and applicants discussed what happened in the mine and Cochran once again told the men that they could return to work setting timbers. The men still refused this job, but asked whether they could return to work the next day. Cochran informed them that they could return that same day but not the next, because he believed it would be unfair to the men who continued to work to permit the applicants to leave and return the next day.

After this discussion, the applicants left the mine site and reported the incident to the Union Safety Coordinator.⁴ The safety coordi-

nator, the mine officials, and the applicants met on April 15, 1971, and again on April 29, 1971. At these meetings the mine officials refused to reinstate the three employees, but did agree to pay the men for their work through April 15 and to pay their pro-rata vacation pay.

On April 22, 1971, the applicants, through the UMWA, filed an application under subsection 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act"), for review of "* * * Acts of Discrimination and Discharge." In response to a show cause order of the examiner, the Application was amended on June 24, 1971, to allege that a violation occurred under that subsection and that the Secretary had jurisdiction by virtue of the Application.

After the prehearing conference and before the hearing, the parties filed and the examiner accepted the following stipulation as to the legal issue involved in the proceeding:

Do the events surrounding the termination of Applicants'-Petitioners' employment by Respondent constitute discriminatory discharge of miners by reason of the fact that such miners have notified "the Secretary or his authorized representative of any alleged violation or danger" as provided by section 110 (b) (1) (A) of the Federal Coal Mine Health and Safety Act of 1969?

A hearing was held on the Application August 17-19, 1971, at Ar-

⁴ A union safety coordinator is a district official of the Union who is not an employee of a mine. His functions are to work with the Director of the Safety Division of UMWA and the UMWA President of each District in the

promotion of safety generally; to work with mine management; and to accompany Federal and State Inspectors and Mine Safety Committees, presumably on mine inspections. Applicant's Exhibit No. 27.

lington, Virginia, and on February 29, 1972, the examiner issued a decision ordering the reinstatement of the three applicants and payment of their back wages. The examiner found that Smitty Baker twice discharged the applicants, once on April 15, 1971, and again upon refusing to reinstate them on April 29, 1971. He held that on both dates the operator had discharged the applicants in violation of subsection 110(b) (1) (A) " * * * by reason of the fact that the Applicants had notified an authorized representative of the Secretary of Interior of an alleged violation or danger at Respondent's mine," and " * * * because they notified their Union Safety Coordinator of alleged safety violations and dangers at Respondent's mine."

Smitty Baker filed a timely notice of appeal with the Board, and, on April 3, 1972, filed its brief. The Union on behalf of the Appellee-Applicants filed a brief on April 24, 1972. Oral argument before the Board was held May 12, 1972.

II.

Issue Presented to the Board for Review

Whether the evidence in the record supports the findings and conclusions of the examiner that applicants sustained their burden of proving a violation by the respondent of the provisions of subsection 110(b) (1) (A) of the Act.

III.

Proof Required to Establish a Violation of Subsection 110(b) (1) (A) of the Act

The applicants in this proceeding claim entitlement to reinstatement of employment and back wages pursuant to paragraph (2) of subsection 110(b) of the Act.⁵ As a condition precedent to such entitlement, that paragraph requires proof by the applicants that their

⁵ Subsection 110(b) (2) provides:

"Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein. Any order issued by the Secretary under this paragraph shall be subject to judicial review in accordance with section 106 of this Act. Violations by any person of paragraph (1) of this subsection shall be subject to the provisions of sections 108 and 109(a) of this title."

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employer, the respondent, violated paragraph (1) of subsection 110(b). By the stipulation of the parties, referred to above, the issues herein are narrowed to the elements of proof in clause (A) of paragraph (1) of subsection 110(b). The procedural regulation relating to burden of proof, in effect at the time of the hearing, places the burden upon the applicants to prove each element by a preponderance of the evidence.⁶

Since this is the first case to come before the Board under subsection 110(b) of the Act, it is essential to specify and discuss the elements of proof for this case as set forth in clause (A) of subsection 110(b) (1).

Subsection 110(b) (1) provides as follows:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

⁶ Regulation, 30 CFR § 301.6S, in effect from March 28, 1970, to August 28, 1971, reads as follows:

"Burden of Proof. In proceedings under Subparts B, C, and F of this part, the burden of proof shall be on the Bureau of Mines. In all other proceedings, the burden of proof shall be on the moving party." (Note, Subpart E pertained to procedures involving applications for compensation or for review of discharge or acts of discrimination under section 110 of the Act.)

The words used in subsection 110(b) (1) (A) are of the common, ordinary, and nontechnical variety and need no special construction or interpretation. Their common and ordinary meanings clearly spell out what facts or elements must be proved to establish a violation. They are: (1) that a miner has reported to the Secretary or an authorized representative of the Secretary an alleged violation or danger in a coal mine; (2) that after such reporting occurred, such miner was discharged from his employment; and (3) that such discharge was motivated by reason of such reporting and not for some other reason.⁷

A necessary incident of the motivation, of course, is knowledge of the reporting on the part of the discharging party. No person can be motivated to do something because of a fact or the occurrence of an event of which he is unaware.

Clause (A) of subsection 110(b) (1) is intended to protect the reporting by miners of alleged safety violations or dangers in coal mines. However, the plain language of clause (A) of subsection 110(b) (1) limits the protection to reporting alleged violations or dangers to the

⁷ These elements of proof will be applicable in most factual situations; however, we realize that it may be necessary to refine these elements on a case-by-case basis. For example, as explained by the examiner, should an operator discharge a miner under the erroneous belief that such miner had made reports to the Secretary of alleged violations and dangers *and such erroneous belief was the motivation* for such discharge, a violation of subsection 110(b) (1) (A) in our opinion would occur.

Secretary or his authorized representative. It does not protect the making of general safety protests or the reporting of alleged violations or dangers to fellow employees, supervisors, or the management of the coal mine. On the other hand, the miner need not personally make the report directly to the Secretary or to the authorized representative of the Secretary. It is sufficient if he instigates or provides the initial impetus for the required report, provided he intends that the report ultimately will be made to the Secretary or his authorized representative by someone else, who will serve as the medium for communicating the report.

In sum, to prove a violation of clause (A) of subsection 110(b) (1), a direct, causal connection must be established between a discharge of a miner and a *reporting* by him or at his instigation to the Secretary or the Secretary's authorized representative of an alleged violation or danger. Thus, where the direct evidence clearly shows that a discharge took place for a reason which had nothing to do with a report or notice to the Secretary of an alleged violation or danger, a conclusion that a violation of clause (A) of subsection 110(b) (1) has occurred cannot be sustained.

IV.

Ruling of the Board

In the instant proceeding, we are compelled to reverse the decision of the examiner and deny the appli-

cation on two principal grounds: (1) assuming, without deciding, that the applicants were discharged, the applicants failed to prove that Respondent had knowledge of a report to the Secretary, made or instigated jointly or severally by the applicants, which could have motivated the discharge; and (2) the direct evidence shows that the reason for the discharge, assuming a discharge and not a voluntary quit, was the refusal of the applicants to work because of their belief that the roof was dangerous.

V.

The Examiner's Findings with Respect to the Alleged Discharge of the Applicants

The respondent argues that the applicants voluntarily quit their jobs when they left the mine premises on April 15, 1971. On the other hand, applicants contend that the actions of respondent's superintendent on that date constituted a discharge in violation of section 110(b) (1) (A). The examiner concluded that there was a discharge, but in fact found two separate discharges.⁸ Decision of examiner 31-32 (February 29, 1972). The pertinent parts of these findings read as follows:

91. Respondent's actions in ordering the Applicants out of the mine, and in

⁸ On page 50 of the decision, the examiner uses the following language: " * * * The Respondent's arbitrary refusal to reinstate the Applicants on April 29, which constituted a separate discharge action * * *." (Italics supplied.)

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refusing to reinstate them, on April 15, 1971, constituted a discriminatory discharge of the three Applicants because of their prior safety complaints to the Bureau of Mines through their UMW Safety Coordinator. * * *

92. Respondent's action in refusing to reinstate the Applicants on April 29, 1971, constituted a discriminatory discharge of the three Applicants because of their prior safety complaints to the Bureau of Mines through their Union Safety Coordinator (including their complaints to him on April 15, 1971). * * *

We reject the notion that a miner can be discharged, within the meaning of subsection 110(b)(1) of the Act, on more than one occasion by the same employer without any intervening reemployment. The examiner erred in making a finding as to the second discharge.

We have considerable doubt whether the applicant's termination of employment was by discharge or voluntary quit. However, since the essence of our decision turns on the failure of proof as to the element of motivation, we assume, without deciding, that a discharge did, in fact, take place. We, find, nevertheless, that the employment of the applicants was terminated, in one way or another, April 15, 1971, when the applicants left the mine after refusing to go back to work at the request of Frank Cochran, the mine superintendent, because prior to that time they had the option of returning to work.

The examiner's discussion of the subject of "discriminatory discharge" is superfluous under the

Act.⁹ It was likewise unnecessary for the examiner to delve into the question of whether the discharge was "for just cause." Again, the only determination which is relevant under the Act is whether the discharge was motivated by one of the protected activities above outlined, and not whether it may have been an unjust, but unprotected discharge. Section 110 of the Act may not be broadened to provide relief for all unfair or unjust labor practices, and may not be used as a vehicle for resolving grievances which are subject to arbitration under a labor contract or disputes under general labor law.

We now turn to the matter of the motivating force behind the assumed discharge.

VI.

Examiner's Findings and the Evidence with Respect to Motivation

A.

Knowledge of Respondent

On pages 30 and 31 of his deci-

⁹ Congress, by use of the language in subsection 110(b)(1) of the Act, "No person shall discharge or in any other way discriminate * * *," (emphasis added) declared that any discharge of a miner because of the protected activities of the miner is discriminatory. Since Congress has made such declaration, as a matter of law the Examiner's comparison of "discriminatory discharge" as used in the case law under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970), with the prohibited discharge under the Federal Coal Mine Health and Safety Act of 1969 is inapplicable. His detailed discussion of that term in his decision is confusing, as well as irrelevant and immaterial to the stipulated issue in this case.

sion, the examiner made the following Findings:

87. Respondent's management knew, or had reasonable grounds to believe, that Munsey and the two Scotts were active in safety matters and had made numerous safety complaints to Safety Coordinator Gilbert.

88. Respondent's management knew, or had reasonable grounds to believe, that (a) the Applicants had complained to Safety Coordinator Gilbert in February, 1971, after the Applicants attempted a work stoppage on the issue of inadequate ventilation and excess dust in the mine; and (b) Gilbert transmitted their complaints to the Bureau of Mines, thereby causing the Federal inspection which occurred on February 26, 1971.

These findings are erroneous. In order to sustain his conclusion that the respondent's discharge of the applicants was motivated by their reporting activities, the examiner needed to find that respondent knew or believed that applicants had been making or instigating the required reports prior to the discharge. But the direct evidence here does not support such a finding, and the basic facts established in the record do not permit such a finding to be made by inference.

First of all, the examiner made no finding as to who comprised the management personnel of respondent. From the general testimony adduced, we find that such personnel were Ralph Baker, the general manager; Frank Cochran, the mine superintendent; Fred Coeburn, the senior section foreman; and Clement Kempton, section foreman.

There was no direct evidence whatsoever by applicants that any of such management personnel

knew that applicants had made safety complaints to Gilbert, and that he in turn made reports to the Federal mine inspectors at any time prior to the termination of applicants' employment on April 15, 1971. On the other hand, there was direct testimony by the management personnel denying such knowledge.

Fred Coeburn testified that he knew nothing about any phone calls to Mr. Gilbert by applicants complaining about conditions in the mine (Tr. p. 490). Frank Cochran testified that he did not know or believe that Mr. Munsey or the Scotts were busy trying to promote safety in the mine, that he had had two complaints from Munsey about air at the face but no complaints from either of the Scotts, and that he knew nothing about phone calls from applicants to Gilbert requesting that reports be made to Federal mine inspectors, until he heard applicants' testimony at the hearing (Tr. pp. 435-437). Ralph Baker's testimony was in the same vein, *i.e.*, he knew nothing about applicants' safety activities, their phone calls to Gilbert, or the four men coming into the mine late (referring to the February incident) (Tr. pp. 377-379). Clement Kempton did testify that Mr. Munsey was continuously complaining to him about the air, but that he did not at any time hear Mr. Munsey say that he was going to report a condition to Mr. Gilbert (Tr. pp. 519-520).

The examiner erred by partially basing his finding of motivation on "reasonable grounds to believe" as an alternative to the knowledge or

belief required to prompt the statutory motivation for discharge. Simple logic rejects the proposition that motive can be based upon what a person might have reasonable grounds to believe, if, in fact, he does not so believe or know. What one ought to have known is insufficient. Furthermore, we find no statutory duty or obligation imposed upon an operator to ferret out, from among his miner-employees, those who may make or instigate reports to the Secretary from time to time regarding alleged violations or dangers.

This is not to say that direct evidence is the only proper source or basis for making required findings of fact on knowledge. Such findings, of course, may be premised upon inferences if properly drawn from established facts of record. Indeed, motivation for discharge and knowledge by the operator of the protected activities of a miner may frequently be proved only by inference, since evidence of motive and knowledge often will be confined to the mind of the operator. However, in employing the use of inferences, the factfinder must take care to adhere to the fundamental principles of the law of Evidence with respect to inferences and particularly, if an inference is used as an ultimate finding.

For an inference to be properly drawn, first it must be based upon a precedent fact in evidence. Second, the inference must be reasonably related to the facts in evidence

and be a probable product of that evidence.¹⁰ Third, the inference that is chosen must be "more probable" than other possible inferences. If the inference involves probability of an *ultimate fact*, however, the chosen inference must be established to the exclusion of all other possibilities.¹¹ Although there is no explanation in the decision of how the examiner drew his inferences, it is clear that the examiner disregarded these rules in making findings 87 and 88.

With respect to findings 87 and 88, testimony was elicited by the examiner himself, that it was "common knowledge" among the employees of respondent's mine that Applicant Munsey was calling Gilbert, who, in turn, was calling the inspector (Tr. p. 180), and also that "there is kind of a pretty good grapevine in the coal industry." (Tr. p. 466.) Presumably, based upon this thin evidence, the examiner, by inference, found that respondent's management knew or had "reasonable grounds to believe" that applicants were reporting to Gilbert, and he to the inspectors. The finding of knowledge of respondent's management dealt with a finding of an ultimate fact and therefore was subject to the third rule stated above. As we view the record, it was just as probable that the common knowledge among the employees and any grapevine ru-

¹⁰ 32 C.J.S. *Evidence* § 1044 (1964).

¹¹ J. Wigmore, *Evidence* § 41 (3d ed. 1940); 32 A C.J.S., *supra* § 1044 at 827.

mors pertaining to the required knowledge were never transmitted to any of the management personnel of respondent. The examiner indulged in drawing an inference upon the inference, that there was no break-down in the grapevine as a means of communicating knowledge of applicants' reporting activities, which is vital to proving applicants' case. Our observation is further supported by the direct testimony of the management personnel that they had no such knowledge. The examiner made no finding as to the credibility of the witnesses whose testimony was in direct conflict with the inferences drawn to reach findings 87 and 88.¹²

We therefore reject these two findings of the examiner, and find instead, that the Respondent's management did not know of any reports of alleged violations or danger made or instigated by applicants prior to April 15, 1971.

On page 31 of his decision, the examiner made a third finding pertaining to knowledge, which reads as follows:

89. Respondent's management knew, or had reasonable grounds to believe, that (a) the Applicants complained to Safety

Coordinator Gilbert about the incidents of April 15, 1971; and (b) Gilbert transmitted their complaints to the Bureau of Mines, thereby causing the Federal inspection which occurred on April 16, 1971.

The evidence is undisputed that the roof fall incident, which occurred on April 15, 1971, led to the termination of the employment of the applicants approximately at noon of the same day, when the applicants had their conversation with Frank Cochran, the mine superintendent. Applicant Munsey testified (Tr. p. 68) that after he talked with Cochran he then called Mr. Gilbert and told him that " * * * we had been fired at the Smitty Baker Coal Company, on account of safety." This testimony, as to the time of the phone call to Gilbert, is undisputed and clearly shows that if applicants were fired, they were fired *before* any report of the roof fall incident was made to the Safety Coordinator by Applicant Munsey.

In light of this evidence, Finding 89 must fall, because if applicants were discharged *before* the report to Gilbert on the 15th of April, such reporting obviously could not have motivated Cochran to fire the already discharged applicants.

With Findings 87, 88, and 89 rejected, the examiner's conclusion that applicants proved their case cannot be sustained. Applicants' failure to establish knowledge of the reporting breaks the causal chain connecting the protected reporting activity with the motivation for the alleged discharge under subsection 110(b)(1)(A) of the Act.

¹² The Committee reports for the Administrative Procedure Act state in regard to section 8(b) of that Act, " * * * Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material." Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 210-11, 273 as cited in Attorney General's Manual on the Administrative Procedure Act 86 (1947).

B.

*Reason for Applicants'
Termination of Employment*

As a matter of defense the respondent takes the position that first, the termination of applicants' employment on April 15, 1971, was the result of a voluntary quit, and second, even if the termination is considered a discharge, the reason therefor was because of applicants' refusal to work in the belief that the roof was dangerous.

We find that both the direct and circumstantial evidence in the record is conclusive that "refusal to work" motivated the termination of employment and, at least, is persuasive, that the termination was the result of a voluntary quit rather than a discharge.¹³ Although as indicated above, there is some doubt as to a voluntary quit; for purposes of this decision, we assume a discharge.

The only direct evidence that tends to support the examiner's conclusion, that the alleged discharge was because applicants "had notified their Union Safety Coordinator of alleged safety violations

and dangers at Respondent's mine," is the self-serving, uncorroborated testimony of Applicant Munsey that they had been "fired on account of safety." Even that testimony leads to conjecture, whether the term "safety" incorporates the protected activity of reporting violations or dangers to the Secretary.

The undisputed evidence with respect to the colloquy that took place on April 15, 1971, between Coeburn and the applicants, and later the same day between Cochran and the applicants, strongly supports the conclusion that "refusal to work" was the motivation for the assumed discharge and not any reporting. Both the foreman and the mine superintendent, before the alleged discharge was final, tried to persuade the applicants to return to work at the job of timbering, if they did not want to set jacks. It stands to reason if these men, who were certainly part of respondent's management personnel, had by design " * * * as a retaliative and discriminatory measure intended to penalize the Applicants for having complained to the Bureau of Mines and to set an example for other employees not to complain to the Bureau," as suggested by the examiner at page 50 of his decision, they certainly would not have offered to return applicants to work at timbering.

The words "if you are not going to do any work," which preceded the words, "you might as well get your buckets and go home," contradict any finding that a reason, other than

¹³ The testimony of Arnold Scott (Tr. pp. 314-15) is:

[By Mr. Widman]

"Q. Were you ready, willing and able to work on April 15th, 1971?

"A. Yes.

"Q. Were you ready, willing and able to work on April 16th, 1971?

"A. Yes.

"Q. Did you quit your job?

"A. Yes, sir."

(Italics supplied)

refusal to work, was the motivating force for the assumed discharge.

Finally, under the direct examination of his own counsel, Applicant Earnest Scott testified as follows (Tr. pp. 247-48) :

"Q. * * * Did there come a time that you were discharged or discharged by the Smitty Baker Company?

"A. Yes, sir.

"Q. When did that occur?

"A. April the 15th.

"Q. Of what year?

"A. 1971.

"Q. This year?

"A. Yes, sir.

"Q. And what was the reason you were discharged?

"A. Well, failing to work under a bad roof."

Under cross-examination, the same witness testified that he refused to work because he was afraid of the roof.¹⁴

The spontaneous answers of Earnest Scott to the foregoing questions are certainly persuasive that, at least in his mind, the reporting activities did not motivate the alleged discharge, but rather that such

discharge was motivated by his failure to work because of fear of the roof.¹⁵

Arnold Scott's testimony under direct examination, also by his own counsel, was to the same effect, that applicants' fear of the roof motivated the termination of their employment. (Tr. p. 314.)

The Board, therefore, finds and concludes that the reason for the discharge, assuming a discharge and not a voluntary quit, was because applicants refused to work in the belief that the roof was dangerous. Further, we hold that subsection 110(b) (1) (A) of the Act does not prohibit coal mine operators from discharging miners by reason of the fact that they refuse to work. The only protected activity under that subsection is the reporting or instigating of reports of alleged violations or dangers to the Secretary.

All Findings of Fact and Conclusions of Law in the examiner's decision inconsistent with the views expressed in this Opinion are hereby expressly rejected.

¹⁴ Transcript page 272 reads in part as follows :

[By Mr. Patterson]

"Q. The day that you quit working there or the day that you were discharged, whichever you want to call it, you didn't go to work any more, go back to work where they asked you or told you to because you considered that place too unsafe to work in?

"A. I offered to go back the next day.

"Q. I say the day that you didn't offer to go back, the reason you didn't offer to go back was because you considered the place too unsafe to work?

"A. Yes, sir ; I was afraid of the place.

"Q. And the thing that was unsafe was the danger of the roof falling was what you were afraid of, wasn't it, am I right about that?

"A. Right."

¹⁵ "It has frequently been stated in broad general terms that a party is bound or concluded by his own testimony which is favorable to the adverse party, unless such testimony is later withdrawn, explained, or modified. In particular, the view has been taken in a number of cases that if a party, in his testimony, makes a material statement of fact negating his right of action or defense, and no testimony more favorable appears to contradict or modify it, he is bound by it, regardless of its credibility, and his opponent is entitled to hold him to it and even to demand a verdict or finding accordingly as a matter of law * * *." 30 Am. Jur. 2d *Evidence* § 1087 (1967).

August 8, 1972

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

(1) That the Examiner's Decision IS REVERSED, and

(2) The Application IS DENIED.

C. E. ROGERS, Jr., *Chairman.*

DAVID DOANE, *Member.*

JAMES M. DAY, *Director,*
Office of Hearings and Appeals and
Ex officio Member of the Board.

**STRAWBERRY VALLEY PROJECT,
UTAH**

Reclamation Lands: Generally—Reclamation Lands: Leases—Power: Development and Sale

Where a contract between the United States and a water users' association transfers care, operation, and maintenance of a reclamation project to the association and gives it a qualified interest in revenues earned from the operation of project power plants and the leasing of project grazing and farm lands, the association would be entitled to be made whole if use of such lands by the United States for a non-project purpose causes the association to lose revenues that are being credited to it pursuant to the contract.

Reclamation Lands: Generally—Reclamation Lands: Leases—Power: Development and Sale

Revenues earned by a water users' association from the operation of project power plants and the leasing of project grazing and farm lands cannot be distributed to individual water users either before or after project repayment but must be applied to project purposes, where the United States has transferred the care, operation, and maintenance of a reclamation project to the association under a contract which provides that such revenues are to be credited in conformity with subsection I of section 4 of the Act of December 5, 1924 (43 U.S.C. sec. 501).

Oil and Gas Leases: Generally—Oil and Gas Leases: Acquired Lands Leases—Reclamation Lands: Leases

Where a water users' association was under a 1940 contract between the United States and the association transferring care, operation, and maintenance of a reclamation project to the association—entitled to make, subject to the approval of the Secretary of the Interior, oil and gas leases on lands specially acquired for the project and to be credited with the revenues therefrom in conformity with subsection I of section 4 of the Act of December 5, 1924 (43 U.S.C. sec. 501), Congress did not intend, in enacting the Mineral Leasing Act for Acquired Lands of August 7, 1947 (30 U.S.C. sec. 351), to take such rights away from the association.

Reclamation Lands: Acquisition and Disposal

Where title to lands in a reclamation project is in the United States, such lands or any fixtures thereon cannot be sold or mortgaged, either before or after proj-

ect repayment, except as authorized by Congress.

Solicitor's Opinion, M-36051 (December 7, 1950), modified.

M-36863

August 8, 1972

OFFICE OF THE SOLICITOR

TO: COMMISSIONER OF
RECLAMATION.

SUBJECT: STRAWBERRY VALLEY
PROJECT, UTAH.

The Strawberry Valley Project, Utah, was constructed by the Bureau of Reclamation and is being operated and maintained by the Strawberry Water Users' Association pursuant to the Reclamation Act of June 17, 1902 (43 U.S.C. sec. 391) and the acts amendatory thereof and supplementary thereto. You have requested our views on the following questions which have arisen respecting the project:

1. In connection with the enlargement by the United States of the Strawberry Valley Reservoir to accommodate another reclamation project (the Central Utah Project, Bonneville Unit) and the resultant inundation of project lands, is the Association entitled to compensation for loss of revenues from project lands that were acquired for the benefit of the project by a special act of Congress and were subject to a contract between the United States and the project transferring to the project the care, operation, and maintenance of—as well as a qualified interest in the revenues from—

such lands; and if so, what should be the basis for computing compensation?

2. Can the Association issue oil and gas leases on such specially acquired lands; and if so, what disposition should be made of the revenues?

3. Can the Association sell or mortgage a portion of the project electric power transmission system; and if so, what disposition should be made of the proceeds?

For the reasons subsequently discussed, the answers to the first part of the foregoing questions are in the affirmative, with qualifications. Because of their complexity, the answers to the second part of the questions will be deferred to the subsequent discussion.

FACTUAL BACKGROUND

The Strawberry Valley Project was authorized by the Secretary of the Interior in 1905, pursuant to the Reclamation Act of 1902. The Bureau of Reclamation began construction in 1906 and completed the project in 1922.

Among the project lands are about 57,000 acres acquired for the project from the Uintah Indians, as authorized by the Act of April 4, 1910 (36 Stat. 269). The full text of the 1910 Act, as well as a description of the other executive and legislative decisions that are of significance in answering the foregoing questions (including excerpts from the three principal contracts between the United States and the Strawberry Water Users' Associa-

tion—September 28, 1926; November 20, 1928; and October 9, 1940), are set forth in the *Solicitor's Opinion*, M-36051 (December 7, 1950). The latter opinion is attached as an appendix to this opinion and will be referred to again in the subsequent discussion.

The 1910 Act (36 Stat. 269, 285), in pertinent part provided as follows:

The Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of \$1.25 per acre for the lands in the former Uintah Indian Reservation, * * * All such payments shall be included in the cost of construction of Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

At the time of the 1910 Act, section 6 of the 1902 Act (43 U.S.C. sec. 498) was the provision of reclamation law governing the transfer of management and operation of a reclamation project to the water users. It provided, in pertinent part, as follows:

* * * [W]hen the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated

thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

On December 5, 1924, Congress passed the so-called Fact Finders' Act, changing the conditions under which management and operation were to pass to the water users. Subsection G of section 4 of the latter legislation (43 U.S.C. sec. 500) provided as follows:

Whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-right contracts between the water users and the United States, said project shall be required, as a condition precedent to receiving the benefits of sections * * * to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users' association or irrigation district, and when the water users assume control of a project, the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments.

Although the owners of the lands irrigated from the Strawberry Valley Project had not made the payments required by the 1902 Act in order for management and operation of the project to pass to them, they did meet the conditions in the

1924 Act for taking over the care, operation, and maintenance. The Strawberry Water Users' Association was organized under Utah corporation law for this purpose, and a contract was entered into on September 28, 1926, between the United States and the Association in which, among other things, the United States agreed to transfer to the Association care, operation and maintenance of the project (with certain exceptions not here pertinent). The lands acquired pursuant to the 1910 Act were designated as "watershed" lands and were expressly included as part of the project. In addition to the watershed lands, the project included other lands which had been acquired or withdrawn from the public domain for the benefit of the project. Under the contract, title to none of this property was to pass to the Association.

Although article 11 of the 1926 contract provided that care, operation, and maintenance of the "entire" project was transferred to the Association and article 22 provided that revenues from the watershed lands (those acquired pursuant to the 1910 Act) were to be collected by the Association and credited pursuant to subsection I of the 1924 Act (43 U.S.C. sec. 501), article 22 also provided—in seeming contradiction—that "title, management, and control" of the watershed lands were not to pass to the Association under the 1910 Act until at least 51 percent of the project construction costs had been paid to the United States. This seeming contradiction

was cleared up by a November 20, 1928 amendment which provided that although 51 percent of the project construction costs had not been paid, "care, operation and maintenance (management and control but not title)" of the watershed lands would be transferred to the Association.

On October 9, 1940, the United States and the Association entered into a new contract, superseding the 1926 and 1928 contracts. The United States extended the time for payment by the Association of unaccrued balances on various repayment obligations. The lands formerly designated as "watershed" lands were thereafter to be called "grazing" lands. Management and control of said lands, as well as care, operation, and maintenance of the project, were to remain in the Association, but title to the grazing lands, as well as all other works and property transferred to the Association for care, operation, and maintenance, was to be retained by the United States until otherwise provided by Congress. Revenues from the grazing lands and the Government's investment in the power system were to be credited to the water users in conformance with subsection I of the 1924 Act. Subsection I provided as follows:

Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be

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credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

The 1940 contract also provided that the Secretary would retain supervisory authority over the project. Thus, the Association could make no substantial change in any of the project works without first obtaining the written consent of the Secretary [art. 14(c)]; the Association could make no contract affecting the project unless approved by the Secretary (except for the usual labor, equipment, supplies, and services in connection with operation and maintenance) [art. 14(f)]; all contracts for the sale or lease of power or power privileges were to be upon terms and conditions and at rates approved by the Secretary, and no additional capital investment was to be made by the Association in the power system unless approved by the Secretary (art. 21); and the United States could take back and operate and maintain all or any part of the property and works title to which was in the United States if the Secretary found that the Association was in default or operating the project or any part thereof in violation of the contract (art. 34).

DISCUSSION

1. Compensation to Association for use by United States of specially acquired lands

The 1940 contract superseded the 1926 and 1928 contracts. It also redefined such rights as the Association might have had under the 1910 Act. The Association agreed to take something less than it would have had thereunder—for one thing, by leaving title in the United States until otherwise provided by Congress. In return, the Association acquired rights under the 1940 contract that it would not have had under the 1910 Act—for one thing, an extension of the time for the Association's obligation to repay the cost of construction. Thus supported by adequate consideration, the 1940 contract was effective to modify the rights that the water users might have had under the 1910 Act. The purpose of the Act was to define the rights of the water users in the specially acquired lands; it was not to limit the Secretary's contracting authority under reclamation law. Accordingly, the Secretary had the authority and the Association was competent to contract with respect to such rights.

By the same token, the 1940 contract was effective to bind the Secretary to the bargain he had made with the water users. Part of that bargain was that the Association would have a qualified interest in the revenues from leasing the specially acquired lands (designated as

"grazing" lands in the contract) and from the Government's investment in the power system. Article 22 provided as follows:

Annual credits to project water users for all or any part of the profits realized from the grazing lands and the Government's investment in the power system shall be pro rated equally to each acre-foot of the water that has been sold from the project water supply: *Provided, That*, as to water sold from the water supply of the project during the year for which credit is being given, credit shall be given only for that part of the year from the date of the sale of such water. Credits so given to project water users shall conform to the requirements of Sub-section I of Section 4 of the Act of December 5, 1924 (43 Stat., 701).

Within thirty days after the end of each calendar year, the Association shall submit to the United States detailed statements concerning the operation of and profits from the grazing lands and power system for the preceding calendar year.

In the event the United States resumes control of the grazing lands or power system or both as permitted under Article 34, profits apportionable to the Association's investment in the power system shall be accounted for as directed by the Association, but other profits, as determined by the Secretary after the end of each calendar year, shall be credited annually to the project water users and to the Association's obligations to the United States in the manner to be determined by the Secretary, but not inconsistent with the provisions of Subsection I of the Act of December 5, 1924.

As under the 1910 Act, the water users are to be credited with revenues from the grazing lands; but the credits are to be given in the manner prescribed by subsection I. Under subsection I, revenues are to be credited annually, applying them

first to the annual obligation of the Association for repayment of project construction charges; second, to the annual obligation of the Association for the payment of project operation and maintenance charges; and third, for such purposes as the water users might direct. That the water users have a contractual right to collect such revenues and have them applied in the foregoing manner is confirmed by the provision in article 22 that in the event the United States were to resume control of the grazing lands or power system pursuant to article 34 (because of a default by the Association), such revenues would continue to be credited annually in a manner not inconsistent with subsection I.

Therefore, if the United States uses part of the grazing lands for a non-project purpose (such as the enlargement of the Strawberry Valley Reservoir to provide additional storage capacity to be used in connection with the Central Utah Project, Bonneville Unit) and the Association loses revenues that are being credited pursuant to subsection I, the Association would be entitled to be made whole for the loss of such revenues. However, because of the supervisory role retained by the Secretary respecting the care, operation, and maintenance of the project, the Association would not be entitled to compensation for any losses of revenues for uses of project land that the Secretary determines are incompatible with project purposes.

Since there is no contrary direction under either the 1940 contract

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or subsection I, the revenues from the grazing lands and the Government's investment in the power system would continue to be credited after repayment of project construction costs in the same way as they had been credited before.¹ They would, of course, no longer be required to be credited against construction charges, but they would be available for payment of operation and maintenance charges and as the water users directed, subject to the limitations discussed below. In reaching this conclusion, we also find that the Strawberry Valley Project is expected from the application of the Hayden-O'Mahoney Amendment (Act of May 9, 1938, 43 U.S.C. sec. 392a). If applicable to the Strawberry Valley Project, the Hayden-O'Mahoney Amendment would have required that net power revenues from the Government's investment in the power system be deposited in the Treasury after such investment had been repaid, instead of continuing to be available for disposition under subsection I, as provided in the 1940 contract.

The Hayden-O'Mahoney Amendment provided, in pertinent part, as follows:

All moneys received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation, and financed in whole or

in part with moneys heretofore or hereafter appropriated or allocated therefor by the Federal Government, shall be covered into the reclamation fund, *except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such project: Provided, That* after the net revenues derived from the sale of power developed in connection with any of said projects shall have repaid those construction costs of such projects allocated to power to be repaid by power revenues therefrom and shall no longer be required to meet the contractual obligations of the United States, then said net revenues derived from the sale of power developed in connection with such project shall, after the close of each fiscal year, be transferred to and covered into the General Treasury as "miscellaneous receipts" * * *. (Italics added.)

When the Hayden-O'Mahoney legislation was proposed in Congress, it gave rise to correspondence between the Association and the National Reclamation Association (NRA) and between NRA and the Bureau of Reclamation. In a March 30, 1938 letter from the Association to NRA, the Association expressed its concern, stating its understanding that "when the project construction costs have been repaid in full to the United States all benefits from the Strawberry Valley Project will accrue to the water users thereunder." NRA sent a copy of this letter to the Bureau of Reclamation, and in an April 2, 1938 response from the Bureau to NRA, the Bureau pointed out that nothing contained in the proposed legislation would impair any rights that the Association had under its contract with the United States. As

¹ To the extent that the November 14, 1968 memorandum of the Associate Solicitor, Reclamation and Power, to the Regional Solicitor, Salt Lake City, on a related subject is inconsistent with this conclusion, it is superseded by this opinion.

originally introduced, the bill had not contained the exception noted in brackets in the foregoing excerpt from the Amendment. The italicized material was added following the referred-to correspondence in order to assure the Association and other water-user organizations that the Amendment was not intended to apply to cases where contrary arrangements had been made by law or contract. Since the Strawberry Valley Project came within the latter category, the exception was, in our opinion, effective not only to preserve the Association's rights to the power revenues as they existed prior to the 1938 enactment of the Hayden-O'Mahoney Amendment but also to enable the Secretary to continue to recognize such rights in the 1940 contract.

However, we have to look to subsection I to determine what the Association's rights are under the 1940 contract, and we read subsection I as prohibiting distributions of project revenues to individual water users, both before and after project repayment. Before project repayment, the prohibition is express, the last sentence of subsection I stating: "No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid." Although it has been argued that a provision such as this, expressly prohibiting distributions to individual water users prior to project repayment, implies an authorization to make such distributions after project repayment, we

do not believe that is what Congress intended. When Congress enacted subsection I in 1924, it was—as the legislative history of the 1924 Act bears out—preoccupied with the problems of administering such projects in the period prior to repayment. Accordingly, no positive inference can properly be drawn from the failure to extend the prohibition against distributions to individual water users to the period following repayment.

In fact, Congress subsequently expressly negated such an inference by the Act of July 1, 1946, 16 U.S.C. sec. 825t, which provided that: "No power revenues on any project shall be distributed as profits, before or after retirement of the project debt, and nothing contained in any previous appropriation Act shall be deemed to have authorized such distribution: *Provided*, That the application of such revenues to the cost of operation, maintenance, and debt service of the irrigation system of the project, or to other purposes in aid of such irrigation system, shall not be construed to be such a distribution." The report (No. 1434) of the Senate Committee on Appropriations, 79th Congress, Second Session, on the bill (H.R. 6335) which became the 1946 Act stated that the legislation was "declaratory of existing law" and that it removed any doubt as to the intended effect of subsection I. "It is the intent of the reclamation laws", the report continued, "that the power revenues shall be applied for project purposes and not distributed

as profits to any individual before or after the United States has been repaid its investment."

The 1946 Act actually has a double significance. Not only does it make clear that under subsection I power revenues are not to be distributed to individual water users after repayment; it also confirms that revenues subject to disposition under subsection I may be applied to project purposes after project repayment instead of being deposited in the General Treasury as would otherwise have been required by the Hayden-O'Mahoney Act. A project purpose would, in our opinion, be any expenditure reasonably related to the project, including operation and maintenance and capital investments for the replacement, improvement, and expansion of project works.

Congress was in the 1946 Act addressing itself only to power revenues, since they were the most conspicuous source of project profits; only rarely do the revenues from grazing lands offer prospects for substantial revenues. However, the same policy that prompted the prohibition against distributions to individuals of profits from power revenues would apply equally to profits from revenues from grazing lands. In the light of such a clear statement of Congressional policy, we could not sanction distributions to individual water users of profits from grazing lands or power operations, either before or after project repayment.

2. Oil and gas leases

The authority of the Association to issue oil and gas leases on the lands acquired for the Strawberry Valley Project by the 1910 Act was discussed and affirmed in the *Solicitor's Opinion, supra*, a copy of which has been appended hereto. We concur with the conclusion in that opinion that the Association can issue oil and gas leases on such lands and that the revenues from the leases are to be applied in accordance with subsection I of the 1924 Act. The restrictions that are imposed under subsection I on the disposition of revenues from the leasing of grazing lands and from the Government's investment in the power system (which were discussed above) would also apply to the disposition of revenues from oil and gas leases on the grazing lands.

The following qualifications should be noted with respect to the 1950 opinion:

1. The opinion does not refer to the continuing supervisory authority of the Secretary (the details of which were discussed in an earlier part of this opinion) over all aspects of the Association's care, operation, and maintenance of the project. The most significant aspect of the Secretary's supervisory authority affecting oil and gas leases would be article 14(f) of the 1940 contract precluding the Association from making any contract affecting the project unless approved by the Secretary (except for

the usual labor, equipment, supplies, and services in connection with operation and maintenance).

2. The opinion states that the "beneficial" interest in these lands is vested in the owners of the lands irrigated from the Strawberry Valley project. Although the water users clearly have an interest in these lands, they do not, in our opinion, have a "beneficial" interest. The 1910 Act did not contemplate that "title, management, and control" would pass to individual water users, but to some "form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior," in conformance with section 6 of the Reclamation Act of 1902. Nor does the Association—as the form of organization contemplated by the 1902 Act—have a "beneficial" interest in these lands, in the classic law-of-trusts sense. Whatever its rights might have been under the 1910 Act, those rights were re-defined in the 1940 contract.

3. *Sale or mortgage of portion of project electric power transmission system*

The answer to the question of whether the Association can sell or mortgage a part of the project electric power transmission system depends upon whether title is in the United States. If it is, the property cannot be sold or mortgaged without Congressional approval. If title is not in the United States, it can be sold or mortgaged by the Asso-

ciation, subject to the Secretary's supervisory authority.

Article 23 of the 1940 contract provided that title to all works and property which were transferred to the care, operation, and maintenance of the Association by the 1926 and 1928 contracts and "such property as has been added to the project works, including additions to the power system," was to remain in the United States until otherwise provided by Congress. Article 21 provided that no additional capital investment was to be made in the power system without the approval of the Secretary.

We read the foregoing provisions to mean that title was reserved in the United States to all project property (including the power system) as of the time of the 1940 contract, but title was not reserved in the United States to such additions to the project (including additions to the power system) as were made after the 1940 contract, unless the additions became fixtures on lands to which title was in the United States or unless it was expressly provided in connection with an approval sought from the Secretary under article 21 that title would remain in the United States. Accordingly, when in 1942 the Secretary approved construction by the Association of the Payson power plant and appurtenant distribution facilities, title to these additions to the power system was expressly reserved in the United States. Such an express reservation would have been unnecessary if the 1940 con-

tract had already reserved title in the United States to such additions to the power system.

This conclusion is confirmed by noting the following changes from the 1926 to the 1940 contracts that pertain to the power system:

1. Article 23 of the 1926 contract made additions to the power system expressly subject to article 13; and article 13 provided, among other things, that title to all improvements in the project works were to be in the United States. Unlike article 23 of the 1926 contract, the parallel provision in the 1940 contract (art. 21) does not make additions to the power system expressly subject to the provision in the 1940 contract [art. 14(c)] which is parallel to article 13 of the 1926 contract.

2. In addition to a general provision in the 1926 contract dealing with title to project property (art. 11), the 1926 contract also contained a separate provision specifically reserving title to the power system in the United States (art. 23); whereas the 1940 contract does not treat separately the issue of title to the power system but treats it together with title to project property in general (art. 23).

If title to a part of the project transmission system is not in the United States and it is sold or mortgaged by the Association, with the Secretary's approval, the proceeds should be disposed of in a manner consistent with the manner in which the Association could have disposed of the project revenues used to in-

vest in such portions of the transmission system. As we pointed out earlier in this opinion, under subsection I the Association could have used annual project revenues—in excess of the amount required to repay the project's annual construction charge and the project's annual operation and maintenance charge—for investment in the project transmission system. However, since those revenues could not have been distributed to individual water users, the proceeds of the sale or mortgage of a part of the project transmission system in which the revenues had been invested similarly could not be distributed to individual water users. On the other hand, if the funds invested in such part of the transmission system had not been subject to the restrictions of subsection I, the Association could dispose of the proceeds as it wished. In a case where the sources of the investment funds are mixed, the proceeds should be allocated proportionately.

The conclusion that the Association may—subject to the restrictions discussed above—dispose of the proceeds of a sale or mortgage of property to which it has title is consistent with our opinion in the Weber River case, where title to the property in issue was not in the Weber River Water Users' Association but in the United States. In response to a proposal to grant a perpetual easement over the property to the Utah Highway Department in exchange for a lump-sum payment, we advised Weber River

on May 28, 1969, that the proceeds would have to be deposited in the reclamation fund of the Treasury to the credit of the project. This was necessary notwithstanding that Weber River had already fully repaid the Government's investment, which included the cost of acquiring the property.

Although the water users may under subsection I dispose of annual revenues from the leasing of project grazing and farm lands, it is Congressional policy—as manifested in the Act of February 2, 1911, 43 U.S.C. sec. 374—that the proceeds of the sale of property acquired for a reclamation project be deposited in the reclamation fund of the Treasury to the credit of the project. In the Weber River case we concluded that transactions of the kind proposed—involving the granting of long-term easements or leases in exchange for lump-sum payments—were qualitatively more closely related to a sale than to the kind of leasing contemplated by subsection I.

After the proceeds of such a transaction have been deposited in the Treasury, it would be up to Congress to decide whether and when to appropriate the funds to the disposal of the water users. Since the decision of whether and when to transfer title of project property to the water users after project repayment has been reserved to Congress, it is appropriate that the decision of whether and when to give the water users the proceeds of what would in substance be a sale of project property should similarly be re-

served to Congress. Otherwise, the water users could circumvent the reservation of title to project property in the United States by granting long-term easements or leases in exchange for lump-sum payments.

MITCHELL MELICH,
Solicitor.

M-36051

December 7, 1950

TO: THE DIRECTOR, BUREAU OF
LAND MANAGEMENT.

SUBJECT: OIL AND GAS LEASES ON
LAND IN THE STRAWBERRY
VALLEY RECLAMATION
PROJECT.

This responds to your request for my opinion on two questions concerning five noncompetitive oil and gas leases¹ issued by the Department pursuant to section 17 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. sec. 226 (1946), on certain land in the Strawberry Valley reclamation project.

The land included in the five leases is situated in the Uintah Valley, Utah, which was set apart in 1861 as a permanent reservation for Indians.² By the Act of May 27, 1902 (32 Stat. 245, 263), the Secretary of the Interior was directed to allot land in the reservation to the Indians prior to October 1, 1903, "on which date all the unallotted lands within said reservation shall be restored to the public domain."

¹ Salt Lake City 068640-068644, inclusive.

² Presidential Proclamation of October 3, 1861 (1 Kappler 900); Act of May 5, 1864 (13 Stat. 63).

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By subsequent Acts,³ the time for opening the unallotted lands to public entry was extended from October 1, 1903, to March 10, 1905. Finally, by the Act of March 3, 1905 (33 Stat. 1048, 1069), it was provided that the time for opening the unallotted lands to public entry would be extended to September 1, 1905, unless the President should determine that the lands could be opened to entry at an earlier date. The 1905 Act also provided that the unallotted lands should be opened to entry by proclamation of the President, and "That before the opening of the Uintah Indian Reservation the President * * * may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development * * *" (33 Stat. 1070).

In accordance with the 1905 Act, the President issued a proclamation on July 14, 1905 (34 Stat. 3119), opening to entry on August 28, 1905, all unallotted lands in the reservation, except such land as might be reserved for other purposes by that date. On August 3, 1905, the President issued a second proclamation (34 Stat. 3141), which withdrew certain land in the reservation "for reservoir site necessary to conserve the water supply for the Indians." This proclamation was modified on August 14, 1905, by a third proclamation (34 Stat. 3143), which re-

duced the area of land previously withdrawn to a total of 60,068.51 acres. The withdrawn land included all the land which is embraced in the five oil and gas leases now under consideration.

Subsequently, on May 13, 1907, and November 12, 1909, a total of 56,868.51 acres of withdrawn land were included in two first-form reclamation withdrawals made by the Secretary of the Interior pursuant to section 3 of the Reclamation Act of June 17, 1902, 43 U.S.C. sec. 416 (1946), for the benefit of the Strawberry Valley project. These withdrawals included all the land contained in three of the five leases presently under consideration, and part of the land included in the other two leases. The remainder of the leased land with which we are concerned is comprised within the 3,200 acres which were withdrawn by the President's proclamation of August 3, 1905, as modified by the proclamation of August 14, 1905, but which were not affected by the reclamation withdrawal orders of 1907 and 1909.

Following the two reclamation withdrawals, Congress passed the Act of April 4, 1910, which provided in part as follows:

That the Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nine-

³ Act of March 3, 1903 (32 Stat. 982, 998); Act of April 21, 1904 (33 Stat. 189, 207).

teen hundred and five, chapter fourteen hundred and seventy-nine, and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the Reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project. * * * All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

The last sentence in this quoted portion of the 1910 Act apparently referred to section 6 of the Reclamation Act, 43 U.S.C. secs. 491, 498 (1946), which reads as follows:

That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

A short time later, on October 20, 1910, the Secretary of the Interior withdrew for the use of the Strawberry Valley project the remaining 3,200 acres of land which had been reserved by the President in the proclamations of August 3 and 14, 1905. Thus, all the land withdrawn by the President was subsequently included by the Secretary of the Interior in reclamation withdrawals made for the benefit of the Strawberry Valley project, and all the land in the five oil and gas leases with which we are concerned is included in the overlapping withdrawals. However, only the land included in the reclamation withdrawals of 1907 and 1909 (*i.e.*, 56,868.51 acres) was affected by the Act of April 4, 1910.

Thereafter, Congress passed the Act of December 5, 1924, section 4 of which is known as the Fact Finders' Act (43 Stat. 701). Subsection G of section 4, 43 U.S.C. sec. 500 (1946), provides that whenever two-thirds of the irrigable area of a reclamation project shall be covered by water-right contracts between the water users and the United States, the project shall be required, as a condition precedent to receiving the benefits of the Act, "to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe * * *." subsection I of section 4 (43 U.S.C. sec. 501 (1946)), provides that when-

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ever the water users take over the care, operation, and maintenance of a project, the net profits derived from the operation of project power plants, "leasing of project grazing and farm lands", and the sale or use of townsites shall be credited to construction charges, operation and maintenance charges, etc.

On September 28, 1926, the Secretary of the Interior entered into a contract (Ilr-78) with the Strawberry Water Users' Association for the purpose of enabling the project to obtain the benefits of the Fact Finders' Act. Article 11 of the contract transferred to the Association "the care, operation and maintenance of the entire Strawberry Valley project", except for a lateral and a canal which had already been turned over to certain irrigation districts and a canal company, but the article provided that no title to any of the property belonging to the project passed to the Association. Article 5 of the contract recited that under the Act of April 4, 1910, "there was acquired by purchase" for the project 56,868.51 acres of grazing land protecting the watershed of the Strawberry reservoir. Article 22 provided that the receipts from the land, designated in the contract as the "watershed lands", should be disposed of in the manner provided by subsection I of the Fact Finders' Act. Article 22 also specifically provided "that the title, management and control" of the watershed lands should not pass to the Association under the 1910 Act until 51 percent of the project

construction cost was paid to the United States. The watershed lands were described in Schedule A of the contract. They included all the land covered by the five oil and gas leases under consideration here, except the 3,200 acres which were not withdrawn for reclamation purposes until October 20, 1910, after the passage of the 1910 Act.

On November 20, 1928, the 1926 contract was amended "to the extent that the care, operation and maintenance (management and control but not the title) of said 56,869.51 acres of land be and the same is hereby transferred to the association to be utilized by it for the benefit of the owners of the lands irrigated from said project * * *" (Art. 10).

The 1926 contract, *as amended*, was superseded by a contract dated October 9, 1940. The 1940 contract continued the provisions of the 1926 contract which transferred the care, operation, and maintenance of the Strawberry Valley project to the Strawberry Water Users' Association. With respect to the watershed lands, Article 20 of the 1940 contract provides:

Notwithstanding the provisions of the Act of April 4, 1910 (36 Stat. 228), it is agreed that title to the lands described in the attached schedule A (being the same as the lands described in schedule A of the contract of September 28, 1926, and being hereinafter called grazing lands) shall be retained by the United States until otherwise provided by Congress. The management and control of said lands shall remain with the Association * * *.

Article 22 of the 1940 contract provides for the crediting of profits realized from the "grazing lands" (watershed lands) in conformity with subsection I of the Fact Finders' Act.

I

Your first question, in effect, is whether the five oil and gas leases, to the extent that they include watershed lands, should have been issued (1) by the Department pursuant to the Mineral Leasing Act of 1920, *supra*, or (2) by the Department under the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1946 ed., Supp. III, secs. 351-359), or (3) by the Strawberry Water Users' Association.

Although the Uintah Indian reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. This is made clear by the Act of May 27, 1902, which provided for the restoration "to the public domain" of such of the reservation land as might not be allotted to the Indians by a certain date. This date was eventually fixed as August 28, 1905, by the President's proclamation of July 14, 1905, but before August 28, 1905, the President withdrew certain land in the reservation, including the watershed lands, for a reservoir site. This withdrawal necessarily had the effect of preventing the withdrawn land from reverting to the public domain on August 28, 1905.

That the land withdrawn by the President retained its status as In-

dian land after August 28, 1905, seems clearly to be established by the Act of April 4, 1910, which provided for the extinguishment of the Indian title to the 56,868.51 acres which had also been withdrawn by the Secretary for reclamation purposes. If the land referred to in the 1910 Act had previously been restored to the public domain, there would have been no necessity for Congressional action extinguishing the Indian title to the land.

The question, then, is whether the 1910 Act operated to convert the land covered by that Act from Indian land to public domain land. It does not appear that the Act had that effect. The Act provided that the payments to the Indians should be included in the cost of construction of the Strawberry Valley project and should be reimbursed by the owners of lands irrigated from the project; that the title to the land should eventually pass to such owners; and that, in the interim, all rentals and other receipts from the land should be credited to such owners. These provisions strongly suggest, if they do not require, the interpretation that Congress intended by the 1910 Act to sell the watershed lands to the landowners in the Strawberry Valley project, and to transfer the equitable title to the landowners pending the transfer of legal title. Otherwise, there would be no reason to credit the landowners with the receipts derived from the watershed lands.

The legislative history of the 1910 Act, although meagre, supports this

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interpretation. The portion of the Act involved in this discussion first appeared as a separate bill (S. 5926) in the 61st Congress. That bill, however, did not contain the sentence providing that the payments made to the Indians should be included in the construction cost of the Strawberry Valley project, to be reimbursed by the landowners, and that receipts from the land should be credited to the landowners; and the bill did not include the provision for the transfer to the landowners of title to the watershed lands. In lieu of the transfer of title provision, the bill simply provided that the watershed lands should be available in connection with operations under the Reclamation Act, and that any proceeds from the lands should be covered into the reclamation fund. Even so, in the debate on the bill in the Senate, Senator Sutherland of Utah, who handled the bill on the floor, stated that the money paid for the watershed lands "will be charged against the project and will have to be paid ultimately by the farmers who receive the water." (45 Cong. Rec. 1822.) Senator Sutherland also asserted at one point that the land covered by the bill was not public land, and at another point he said that it was public land "charged with a trust for the benefit of the Indian." (45 Cong. Rec. 1822.)

When the 1910 Act, which was an appropriation measure, was before the Senate, the provisions of S. 5926 were added to the 1910 Act by amendment. In conference, the text

quoted above was adopted. The specific inclusion of provisions to the effect that the payments to the Indians should be included in the construction cost of the Strawberry Valley project, to be reimbursed by the owners of land irrigated from the project, and that the title to the watershed lands should pass to such landowners whenever the management and operation of the irrigation works should pass to them, and the substitution, for the original provision in S. 5926 to the effect that the receipts from the watershed lands should go into the reclamation fund, of the requirement that the receipts should be credited to the landowners, seem to demonstrate unequivocally that it was the intent of Congress to provide in the 1910 Act for an immediate transfer of the beneficial interest in the watershed lands to the landowners in the Strawberry Valley project, and for the ultimate transfer to the landowners of legal title to the watershed lands.

The effect of the 1910 Act was discussed at great length in hearings which were held in 1922 on H.R. 10861, 67th Congress, by the House Committee on Public Lands. H.R. 10861 proposed to add all the land covered by the 1910 Act to the Uintah National Forest, to be administered by the Secretary of Agriculture. The bill provided that 10 percent of the receipts from the national forest should be paid into the reclamation fund until the fund was reimbursed for the money paid to the Indians under the 1910 Act,

and that the Strawberry Valley project should be credited with such payments. The bill also provided for the repeal of the 1910 Act to the extent that it was inconsistent with H.R. 10861.

The bill was favorably reported by the House Committee, which expressed the view that the landowners in the Strawberry Valley project had not acquired under the 1910 Act such rights in the watershed lands as to prevent the Congress from enacting legislation like H.R. 10861 (H. Rept. No. 1633, 67th Cong.). However, a dissent to the report was filed by a minority of the committee.

The minority view was based upon a report dated September 7, 1922, by the Secretary of the Interior, who recommended against the enactment of H.R. 10861. Referring to the question whether the 1910 Act required the transfer to the landowners in the Strawberry Valley project of title to the watershed lands, the Secretary stated that the question was immaterial "because the Act of 1910, in connection with the Reclamation law in general, must be construed as transferring to the landowners a valuable right for which they have assumed an obligation to make full payment and have up to date made payment substantially in accordance with the contract obligations assumed and have in fact made payment of a considerable part toward the amount due on account of these lands."

H.R. 10861 was never considered beyond the committee stage. Consequently, the views of the majority of the House Committee on Public Lands cannot be considered as representing a Congressional interpretation of the 1910 Act.

For the reasons given in the preceding discussion, I believe that, although the legal title to the watershed lands is still in the United States, the beneficial interest in these lands is vested in the owners of the lands irrigated from the Strawberry Valley project.

It follows from this view that the watershed lands are not subject to leasing under the Mineral Leasing Act. That Act has been construed by the Attorney General to apply only to the public domain or public lands. 34 Op. Atty. Gen. 171 (1924); 40 Op. Atty. Gen. 9 (1941). The terms "public domain" and "public lands" have been used in various senses, but they generally denote land owned by the United States which is subject to disposal under the general public-land laws. See 34 Op. Atty. Gen., *supra* (at p. 172). It is obvious that the watershed lands do not fall in this category.

It perhaps should be mentioned that the Mineral Leasing Act has been construed to be applicable to lands of the public-domain category which are temporarily unavailable for disposal under the public-land laws because they have been reserved for special purposes. *J. D. Mell, et al.*, 50 L. D. 308 (1924); 43 CFR 191.5, 191.6. In those cases, however, the reservations have been

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created by Acts of the President or of the Secretary of the Interior, and the lands may be restored to public entry by the exercise of the same executive authority that was employed in establishing the reservations. This is not true of the land covered by the 1910 Act.

Turning now to the Mineral Leasing Act for Acquired Lands, which was enacted on August 7, 1947, it may be noted that this Act is broad in scope and applies, with certain exceptions not relevant here, to "all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended * * *" (30 U.S.C., 1946 ed., Supp. III, sec. 351). The watershed lands appear, on first impression, to come within this statutory description.

It will be recalled, however, that the 1910 Act authorized the transfer of the management and control of the watershed lands to the landowners in the Strawberry Valley project whenever the management and operation of the irrigation works should pass to the landowners under the Reclamation Act. Section 6 of the Reclamation Act of 1902 provides that the management and operation of irrigation works constructed under the Act shall pass to the owners of the lands irrigated from such works whenever the payments required by the Act have been made for the major portion of the lands irrigated from the works. Subsection G of the Fact Finders' Act also authorizes the transfer of the care, operation, and maintenance

of project works to a water users' association whenever two-thirds of the irrigable area of a project are covered by water-right contracts.

The complete management and control of the land described in the 1910 Act was turned over to the Strawberry Water Users' Association, pursuant to these statutory authorizations, by the 1928 amendment to the contract of September 28, 1926. The Association thereupon acquired a contractual right, subsequently reaffirmed by the contract of October 9, 1940, to exercise complete powers of management and control over the watershed lands. Such powers clearly include the authority to issue oil and gas leases.⁴ This contractual right was in existence on August 7, 1947, the effective date of the Mineral Leasing Act for Acquired Lands, and I do not believe that it was affected by that legislation. There is nothing in the language or legislative history of the 1947 Act to indicate that it was intended to abrogate contractual rights theretofore acquired respecting Government-owned lands under earlier legislation, such as the provisions of the 1910 Act relating to the man-

⁴ Since about 1928, the Strawberry Water Users' Association has been issuing leases on the watershed lands for grazing purposes. On August 1, 1949, the Association issued a lease to Tom F. Costas authorizing him to prospect for and mine gold, silver, copper, and other minerals, excluding oil and gas, on a section of the watershed lands. This lease was approved by the Commissioner of Reclamation on December 20, 1949, pursuant to a delegation of authority to him from the Secretary of the Interior (Order No. 2534, 14 F.R. 5693).

agement and control of the watershed lands.

It is my opinion, therefore, that the watershed lands are not subject to leasing by the Secretary of the Interior under the Mineral Leasing Act for Acquired Lands, but that such lands are subject to mineral leasing by the Strawberry Water Users' Association pursuant to its contract of October 9, 1940.

It follows that there was no authority in the Department to issue the five oil and gas leases discussed in this memorandum, to the extent that the leases include watershed lands. However, on April 26, 1950, the Strawberry Water Users' Association approved and ratified the five leases in so far as they include watershed lands, subject to the condition that the rentals and royalties received from the leases with respect to those lands be credited or paid to the association in conformity with the 1910 Act and as provided by subsection I of the Fact Finders' Act. The ratification was accepted by the Carter Oil Company (the holder of the leases) and approved by the Acting Assistant Commissioner of the Bureau of Reclamation for the Secretary of the Interior. Consequently, there is now no problem with respect to the validity of the leases to the extent that they include watershed lands.

II

Your second question is whether the proceeds from the five oil and gas leases, in so far as they are derived from watershed lands, should

be distributed as provided for in section 35 of the Mineral Leasing Act, 30 U.S.C. sec. 191 (1946), or as provided for in subsection I of the Fact Finders' Act.

It follows from the discussion of your first question that the proceeds from the leases, in so far as they are derived from watershed lands, should be applied in conformity with the 1910 Act and subsection I of the Fact Finders' Act, as provided in the ratification of April 26, 1950.

III

Your two questions are directed only to the watershed lands which are included in the five oil and gas leases. However, the greater portion of the land included in two of the leases (Salt Lake 068643 and 068644) consists of the 3,200 acres of non-watershed lands which were withdrawn by the President's proclamations of August 3 and 14, 1905, but which were not affected by the Act of April 4, 1910. The question of the validity of the two leases in so far as they include these 3,200 acres has not been considered in this opinion.

MASTIN G. WHITE,
Solicitor.

ASHLAND OIL, INC., ET AL.

7 IBLA 58

Decided August 9, 1972

Appeal from decision (W 032652-A et al.) of land office, Cheyenne, Wyoming, of the Bureau of Land Manage-

August 9, 1972

ment, holding oil and gas leases to have terminated.

Affirmed.

Appeals—Rules of Practice: Appeals: Dismissal

Where an appeal has been dismissed because it is deemed moot, and new facts adduced show that the appeal is justiciable, the appeal is properly considered on its merits.

Oil and Gas Leases: Extensions—Words and Phrases

An oil and gas lease which has been extended and has vitality only by reason of its inclusion in a producing unit is not within its "primary term" within the ambit of 30 U.S.C. sec. 226-1(d) (1970).

"Primary term" in that context includes all definite and finite periods of extension fixed by law. It does not include any period of time whose termination depends upon the occurrence or nonoccurrence of a contingency, *e.g.*, the cessation or continuation of production.

Oil and Gas Leases: Drilling—Oil and Gas Leases: Extensions—Oil and Gas Leases: Unit and Cooperative Agreements

Actual drilling operations on an oil and gas lease, commenced during or after a period when a lease exists only by reason of its commitment to a productive unit, are not a sufficient basis for invoking the two-year extension under 30 U.S.C. sec. 226-1(d) (1970).

APPEARANCES: James S. Holmberg, Esq., for the appellants.

OPINION BY MR. FISHMAN INTERIOR BOARD OF LAND APPEALS

The parties, listed in Appendix A, appealed from a decision of

July 13, 1970, of the land office at Cheyenne, Wyoming, holding that the oil and gas leases shown in Appendix A, terminated on March 31, 1970.

Our decision, 6 IBLA 187, of June 15, 1972, dismissed the appeals on the basis that the period of the requested extension terminated on March 31, 1972, and that the appeals were therefore moot.

Our earlier decision was correct on the basis of the data then contained in the record. However, on July 5, 1972, the appellants filed a document requesting consideration of the appeals on their merits. They point out that on February 9, 1971, the Schoonover Unit Agreement was terminated and that termination automatically extends all existing federal leases in the unit to February 9, 1973.¹ This data has been verified and we agree that the new information developed renders the appeals justiciable. Accordingly, we grant reconsideration.

We therefore consider the appeals on their merits. A brief statement of the pertinent facts follows.

Each of the oil and gas leases in issue was issued May 1, 1955, and

¹ 30 U.S.C. § 226(j) (1970) provides in applicable portion:

"* * * Any lease which shall be eliminated from any such approved or prescribed plan, or from any communization or drilling agreement authorized by this section, and any lease which shall be in effect at the termination of any such approved or prescribed plan, or at the termination of any such communization or drilling agreement, unless relinquished, shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities."

See also 30 U.S.C. § 226-1(d) (1970).

thereafter extended under various provisions of the law until March 31, 1967. As of that date, each of the leases was committed to the Schoonover Unit, Number 14-08-0001-8837. The leases were held to be extended by production on another part of the unit. Effective March 31, 1968, the Schoonover Unit was terminated and all leases were further extended until March 31, 1970.

In January of 1970, Webb Resources, Inc., and Samuel Gary purchased all interest in the captioned leases except for certain undivided fractional interests held by Ashland Oil, Inc. Appellants promptly took steps to unitize the leases into a new unit. Schoonover Unit, Number 14-08-0001-11708, was duly approved by the United States Geological Survey effective March 31, 1970. On that date the appellants were conducting diligent drilling operations on the unit, having in mind 30 U.S.C. sec. 226-1(d) (1970).²

In a memorandum to the land office, Cheyenne, Wyoming, dated June 26, 1970, the regional oil and gas supervisor, United States Geological Survey, reported that "[D]rilling operations have fulfilled the drilling requirements

under the Unit Agreement and all operational requirements for a lease extension have been met."

In the decision appealed from, the land office held all of the leases in issue to have expired, despite the diligent drilling operations on the grounds that the leases were not in their primary term as the same is defined in 43 CFR 3107.2-1(b) (35 F.R. 9687, June 13, 1970).³

Regulation 43 CFR 3107.2-3 (35 F.R. 9687, June 13, 1970) provides:

Any lease on which actual drilling operations, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for 2 years and so long thereafter as oil or gas is produced in paying quantities.

The crucial issue presented by the appellants is whether leases, which had been extended by reason of their inclusion in a producing unit, but which were not in the participating area, are still in their "primary term" within the ambit of that regulation. If the leases are deemed to be in that status, the actual drilling operations commenced or diligently prosecuted prior to the end of that period would extend the leases for two years and so long thereafter as oil or gas is produced in paying quantities. *Solicitor's Opinion*, 67

² This subsection reads as follows:

"Any lease issued prior to September 2, 1960 which has been maintained in accordance with applicable statutory requirements and regulations and which pertains to land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities."

³ This subsection reads as follows:

"Primary term. 'Primary term' means all periods in the life of the lease prior to its extension by reason of production of oil or gas in paying quantities."

See LAW OF FEDERAL OIL AND GAS LEASES, § 6.7 at p. 207, ROCKY MOUNTAIN MINERAL LAW FOUNDATION, 1971.

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I.D. 357 (1960), holds that "primary term" includes all periods in the life of a lease prior to its extension by reason of the production of oil and gas in paying quantities.

The precise question raised is whether a lease which has been extended because of production⁴ not on it, but on a unit, is still in its "primary term."

The *Solicitor's Opinion, supra*, pp. 360 and 362, states in applicable portion as follows:

* * * Because of the amendment of section 30(a) of the Mineral Leasing Act to deny an extension of the undeveloped, segregated portions of a lease for two years from the date of any partial assignment made during extension periods for reasons other than production, it appears that Congress intended at least as to future leases that no lease should continue in being for more than 12 years *without production either on the lease or in a unit to which it was committed*. This of course has some bearing on the question before us. It is not conclusive, however, because leases issued prior to the [A]ct [of September 2, 1960 (74 Stat. 781)] were expressly excluded.

* * * * *

It is my conclusion that the intent of Congress in the enactment of section 4(d) was that the words "primary term" as there used covers the entire period in the life of the lease prior to the period of extension because of production.

The essence of continuation of a lease in a producing unit is that production which is occurring on one tract in the unit is deemed to take place constructively on each

contract and lease in the unit.⁵

1 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 110 (1955).

This view is buttressed by the following:

An argument can be made, based upon the strict language of the 1960 Revision and of prior legislation, that the Solicitor's previous interpretation of the law to the effect that "primary term" means the initial 5 year term of a lease is still the law and that a two year extension based upon the commencement of drilling on a pre-September 2, 1960 lease in its tenth year is invalid. Unless and until the matter is contested in the courts, however, it appears that such extensions will be recognized.

What effect does this opinion by the Solicitor have on extensions of pre-September 2, 1960 noncompetitive leases? The right to extend, by partial assignment, both the assigned and the retained portions of a pre-September 2, 1960 lease in its extended term under any provision of the Mineral Leasing Act was not altered by the 1960 Revision. Thus, an extension for two years beyond the tenth lease year may be obtained by partial assignment, followed by another two year extension by reason of the commencement of drilling at the end of the twelfth year. In fact, any combination of extensions, such as by payment of compensatory royalty, segregation from a unitized lease or otherwise, not resulting in production, would apparently constitute a part of the life of the lease prior to extension by reason of production and therefore the lease would

⁵ Sec. 18(b) of the Schoonover Unit Agreement, No. 14-03-0001-8837, provided as follows:

"(b) Drilling and producing operations performed hereunder upon any tract of unitized lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of unitized land, and no lease shall be deemed to expire by reason of failure to drill or produce wells situated on the land therein embraced."

⁴ Obviously, a lease which has been extended because of production on that lease is not in its "primary term", as defined in 43 CFR 3107.2-1(b) and *Solicitor's Opinion, supra*.

be within its primary term as defined by the Solicitor and entitled to an additional two year commencement-of-drilling extension. *Extension by commitment to a unit in which there is production would seem to be excluded because of prior decisions that production within the unit is deemed to be production on each lease committed thereto.* [Footnotes omitted.] [Italics supplied.]

7 ROCKY MOUNTAIN MINERAL LAW INSTITUTE at 228-229 (1962).

Further support for this concept is enunciated in *Seaboard Oil Co.*, 64 I.D. 405, 411 (1957) as follows:

The question then is whether the extension of a noncompetitive lease committed to a unit agreement falls in the category of extensions of producing leases or in the category of extension provisions like the assignment provision. *The history of the unitization provision shows clearly that a unitized lease falls in the category of producing leases.* Prior to the 1946 act there was no statutory provision for the extension of unitized leases except 20-year leases. Unitized leases dependent upon production for continuance beyond their fixed terms were therefore seemingly dependent upon actual production for continuance. However, because of provisions in unit agreements that drilling and producing operations performed on any unitized land would be deemed to be operations under and for the benefit of all unitized leases, the Department held that all unitized noncompetitive leases would be extended so long as there was production in paying quantities anywhere in the unit area. All unitized leases were in effect deemed to be a single consolidated lease so far as production was concerned. When the 1946 act was before the Congress for consideration, the Depart-

ment recommended the inclusion of a provision which would ratify and expressly sanction the Department's practice of extending unitized leases. Congress adopted the Department's proposal without change. It is indisputable therefore that the intent of section 17(b) was to extend unitized noncompetitive leases on the theory that they are all, in effect, a single consolidated lease so that production anywhere in the unit area will extend all the leases even though there is no actual production from or allocated to a particular lease and even though the land in a lease is not even deemed to be situated on the known geologic structure of a producing field. [Footnote omitted.] [Italics supplied.]

We therefore conclude that: (1) a lease which has been extended by reason of being committed to a producing unit has been extended by reason of production; (2) such a lease is no longer in its "primary term"; and (3) actual drilling operations on a lease so extended creates no right to a two-year extension under the Mineral Leasing Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member.*

WE CONCUR:

ANNE POINDEXTER LEWIS, *Member.*

DOUGLAS E. HENRIQUES, *Member.*

APPENDIX

<i>Serial Number</i>	<i>Lessees</i>	<i>Serial Number</i>	<i>Lessees</i>
Wyoming		Wyoming—Continued	
032652-A	Ashland Oil, Inc. Webb Resources, Inc. Samuel Gary	032653-D	Webb Resources, Inc. Samuel Gary
032652-F	Webb Resources, Inc. Samuel Gary	032653-H	Webb Resources, Inc. Samuel Gary
032652-G	Webb Resources, Inc. Samuel Gary	032653-I	Webb Resources, Inc. Samuel Gary
032652-H	Ashland Oil, Inc. Webb Resources, Inc. Samuel Gary	032654-C	Webb Resources, Inc. Samuel Gary
032652-L	Webb Resources, Inc. Samuel Gary	032654-F	Webb Resources, Inc. Samuel Gary
032653-B	Ashland Oil, Inc. Webb Resources, Inc. Samuel Gary	032655-F	Webb Resources, Inc. Samuel Gary
032653-C	Webb Resources, Inc. Samuel Gary	032655-G	Webb Resources, Inc. Samuel Gary
		032655-H	Webb Resources, Inc. Samuel Gary

APPEAL OF R. A. ERWIN, CONTRACTOR*

IBCA-863-8-70

Decided July 14, 1972

Appeal from Contract No. 14-10-7-971-144, Construction of Pinto Basin Road, First Section Joshua Tree National Monument, California National Park Service.

Sustained.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras

Where a contract bid invitation provided for alternative methods for the construction of a road, and the specifications required the placement of 4 inches of surfacing material instead of the 6 inches shown in the plans without indicating any change in elevation, or in the specified cross-section profiles, the contractor's action to substantially complete the subgrade elevation 2 inches higher in order to achieve the same finished surface elevation and the acquiescence of the Government supervisor constituted a contemporaneous interpretation of ambiguous specifications. The ambiguity having been resolved by conduct of the parties amounting to an agreed upon, reasonable interpretation of the specifications, subsequent directions by the Government to change the subgrade elevation were compensable contract changes.

APPEARANCES: For appellant, Messrs. David Hennigan, C. Michael McClure Hennigan, Butterwick & Clepper, Riverside, California; for the Government, Mr. Ralph Miham, Department Counsel, San Francisco, California.

OPINION BY MR. LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant was awarded a contract, dated June 21, 1968,¹ to construct approximately seven miles of road designated as the Pinto Basin Road, First Section. It contained a requirement that the project be completed within 150 days after receipt of a notice to proceed which would not be issued until approximately November 1, 1968.² The contract included Standard Form 23-A (June, 1964 Edition), and modified Changes and Disputes clauses.³

The contract bid schedule, specifications and drawings provided for two alternative schedules or methods of construction, designated Schedule 1 and Schedule 1A. The contract was awarded to appellant under Schedule 1A which required a 4-inch emulsified asphalt treated paving material with a chip and seal coat, rather than a 4-inch base course and 2-inch bituminous paving which were specified under Schedule 1.

This is a timely appeal from the contracting officer's decision denying several claims for additional compensation and extensions of the contract performance period. Appellant seeks compensation in the

¹ Item D. All item references are appeal file exhibits.

² Item E, page 2.

³ Item G, Clause 57—"Changes," and Clauses 6 and 24 entitled "Disputes."

*Not in chronological order.

amount of \$46,514.50 for alleged extra work resulting from contract changes. Additionally, appellant seeks an extension of time of 53 days to correct an error in computing the performance period and to cover the performance of the extra work, which would have the effect of relieving him of a liquidated damages assessment of \$2,650 (\$50 a day for 53 days).

By an undated letter,⁴ appellant presented his claims for the following extra work:

1. Rework of the subgrade as a result of staking errors by the Government.

2. Grading for super elevations on curves which were not shown on the plans.

3. Use of import borrow in sections of the road other than indicated on the plans, thereby resulting in a more expensive uphill haul.

4. Rework of the subgrade for elevations and widths not indicated in the contract specifications.⁵

Appellant contends that as drawn, the plans and specifications applied only to the Schedule 1 method of construction and the award of Schedule 1A necessarily involved either (i) raising the elevation of the subgrade by 2 inches in order to have a road of the finished elevation shown on the plans; or

(ii) extending the width of the road; or (iii) different slope ratios as a result of the finished elevation being 2 inches lower than shown on the plans. The Government's position is that the grading preparation and subgrade elevation for either schedule was the same. The Government asserts that apart from normal staking errors, which were corrected as the work progressed, the road was slope staked such that the prepared subgrade would conform to the plans and specifications; and that such staking and grading were not affected by the schedule awarded.

Respecting appellant's claim of entitlement to additional time to perform the work, the Government contends that the appellant commenced work over two months late and thereafter lost time correcting his own grading errors.

The Facts

A pre-construction conference was held on November 8, 1968, which was also the date of the notice to proceed which directed appellant to commence work on November 13, 1968.⁶ Under the notice to proceed the 150-day performance period was computed from November 13, 1968, thereby establishing April 11, 1969 as the completion date. On the notice to proceed appellant entered the date November 18, 1968, as the date of receipt. On January 16, 1969, he began moving equipment on the project.⁷ The work progressed with

⁴ Item B-2.

⁵ No evidence was offered, nor is the record sufficient to support the claims initially made regarding a more expensive uphill hauling of borrow, or for the requirement to grade for super elevations (No. 2 and 3, *supra*). Such claims are mere unsupported assertions, which were apparently abandoned. In the event that they were not abandoned, they are denied for insufficient proof.

⁶ Item C-4.

⁷ Government Exhibit B, Project Supervisor's Diary.

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the subgrade being established along the 396 stations of the project. Appellant used slope stakes to determine the elevation of the subgrade. The slope stakes had previously been placed by an engineering firm hired by the Government. The elevation at the bottom of the ditch is given on the slope stake (Tr. 139).

In March, the Government began to place blue-top stakes along the sides of the roadway to determine the fine grading elevation with greater accuracy than was done by the slope stakes. The placing of blue-top stakes resulted in a determination by Project Supervisor McCabe that the grade was too high by several inches.⁹ The distance in placement of the blue-top stakes from the centerline of the roadway gave rise to a question as to the proper width of the road. At the hearing, Mr. Erwin testified that the blue-tops were placed eleven feet from the centerline (Tr. 47). Mr. McCabe, who directed the placement of the blue-top stakes, stated they were placed twelve feet from the centerline (Tr. 148). Project Inspector Quick, who had participated in placing the stakes, testified they were placed 12 feet, 5 inches from the centerline (Tr. 334).

Similar contradictions exist respecting the proper elevation of the subgrade. The parties do agree that the placement of the blue-tops required the digging of a hole several inches deep in order to drive the

stakes to the elevation determined by Mr. McCabe. However, appellant did not agree the blue-tops were required or that they were placed at the correct elevation. He contends that the grading had already been substantially and correctly completed at the proper elevation in readiness for placement of the 4 inches of asphaltic surface material. He claims that both Messrs. McCabe and Quick had instructed his foreman at the start of the grading operation to raise the grade by 2 inches. He further contends that there were serious errors in the placement of the slope stakes and blue-top stakes discovered during February, March and April. Appellant stopped work from March 14 to March 18⁹ when the blue-top staking generated the controversy over the subgrade elevation.

Thereafter, between the resumption of work on March 18 and April 23, appellant cut the grade down to the newly established level of the blue-top stakes, leaving a plowed out trough 20 to 22 feet wide. On April 23, he took a drawing¹⁰ he had prepared to Mr. McCabe for approval. The drawing depicts 3 dimensioned profiles of the road, labeled road dip, fill section and cut section respectively. The drawing is entitled, "Revised paving cross sections for emulsified base with Chip-Seal." Mr. McCabe signed the drawing on the top line of three such lines prefaced by the

⁹ Exhibit B, entry for March 12, 1969.

⁹ Exhibit B, entry for March 14, 1969.

¹⁰ Item B-10.

word "approved." However, before signing he crossed out "10'" on each side of the centerline of the profile labeled "road dip" and substituted "12'" on each side and initialed the revision (Tr. 129). Appellant proceeded as instructed to remove the earth which had been left on either side of the roadway. He testified that he spread the earth back over the road, compacting it, and wasting some of it over the sides (Tr. 58, 348).

The typical sections or profiles of the road are on Sheet 2 of 18 of the drawings, identified as Drawing No. 156-41000.¹¹ Each of four typical sections shown indicate a 4-inch base course of gravel to be placed over the subgrade, and a 20-foot wide layer of 2-inch bituminous paving. On the "Road dip" section 6:1 ratio drainage slopes on both sides are also paved starting at the edge of the 20-foot wide paving. On the other three typical sections, two foot wide flat shoulders of gravel are shown on both sides of the paving before 3:1 ratio drainage slopes are indicated.

A note beside the typical sections states:

NOTE

In lieu of base course and bituminous paving, use 4" emulsified base with chip and seal coat as alternate. See contract bid schedule.

The Engineer, Mr. Otake, who designed the road and prepared the drawings, testified that the above notation was intended to make the drawings applicable to Schedule 1A

for which there were no drawings (Tr. 256) or dimensions (Tr. 252). Under his interpretation of the plans, Schedule 1A required a finished road 2 inches lower and one foot wider than the 24-foot road shown on the drawings for the Schedule 1 road (Tr. 250-260). In other words, the same profiles were to be followed as shown, omitting the top 2 inches. The alternate paving material would be placed on the subgrade, resulting in a finished road surface 2 inches lower, one foot wider, and with drainage ditches lacking 2 inches of depth.

The project diary shows that Mr. Otake visited the project three times during the course of construction. During his visit on February 25 and 26, he gave Mr. McCabe his interpretation of the plans as requiring a 25-foot wide and 2-inch lower road under Schedule 1A (Tr. 209 and 265). However, he did not discuss his view of the plans with any representative of the contractor (Tr. 265).¹²

In his direct testimony, Mr. McCabe interpreted the plans for Schedule 1A to agree with Mr. Otake's (Tr. 129-130, 134). However, his testimony on cross-examination indicates that he acted on a different interpretation during the contract period. Regarding the placement of blue top-stakes, the following colloquy occurred (Tr. 147-8):

"Q. Sir, I am trying to find out where

¹² Mr. Otake did not attend the pre-construction conference (Tr. 260-263). His name is incorrectly spelled in the transcript as "Otkke."

¹¹ Item H.

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you put the blue-tops. Did you put them along the side of the road or did you put them in the road itself, the roadbed?

"A. We put the blue-tops 12 feet out from the centerline.

"Q. 12 feet out from the centerline?

"A. That is right. That is the shoulder.

"Q. Did you instruct the contractor that he should grade out and take up the blue-tops with his dozer as he graded or he should grade somewhat inside of the place where you put the blue-tops?

"A. You grade to the blue-tops."

Mr. McCabe's actions in the placement of blue-top stakes 12 feet from the centerline and his approval of the B-10 drawing showing each half of the road 12 feet from the centerline indicates that he, at times, was prompted by a different view of the plans than held by Mr. Otake. Mr. Lukens of the engineering firm confirmed that the usual practice is to set the blue-top stake at the shoulder hinge point (Tr. 19).

The difficulties encountered on the project and their cause are perhaps best understood through the testimony and actions of Mr. McCabe. He was on the project daily from the outset until May 26, 1969, and kept the project diary for this period. He testified that in his opinion the contractor's foreman was confused when he came on the job (Tr. 120) and that "he (the foreman) had the idea that he had to have two inches more material on there, on the road, for the subgrade." (Tr. 121.) There is no indication that Mr. McCabe gave any instruction to clear up the confusion or to require the subgrade to be lowered until after Mr. Otake's visit to the project on February 25 and 26, 1969 (Tr.

209). The reason for the engineer's visit was to "get together on the width of the base" (Tr. 207). Mr. McCabe testified as to the necessity of blue-top stakes being set to guide the contractor in his fine grading operations (Tr. 122-123). He duly recorded in his diary entries that the contractor was fine grading 230 stations (over half of the total 396 stations) commencing on March 3, 1969.

Mr. McCabe commenced placing blue-top stakes on March 12, 1969, determined the grade to be too high and instructed the contractor to cut the grade to the top of the blue-top stakes. Mr. Erwin testified that he understood the instructions to be predicated on lowering only the 20-foot wide section to be paved, with the excess dirt on each side to become dirt shoulders (Tr. 47 and 53). On March 22 and 23, 1969, the engineering firm hired by the Government to place the slope stakes before the appellant began work was recalled to the job to correct certain slope stake errors that had been found.¹³ The engineering representative testified the slope stake errors were few and were quickly corrected (Tr. 16). During the visit, the engineering representative advised Mr. McCabe that he was misinterpreting the data on the slope stakes in all the cut sections and consequently was placing the blue-top stakes six inches too low (Tr. 17, 18). On April 16 and 17, Mr. Otake again visited

¹³ Exhibit B.

the project. In the interim since his last visit the subgrade had been cut down to the grade established by the blue-top stakes, leaving a 20-foot to 22-foot plowed out roadway. It was apparently during this visit that he told Mr. McCabe the contractor would have to remove the excess earth along the sides (Tr. 248).¹⁴ A week later, on April 23, 1969, appellant visited Mr. McCabe and presented him with the B-10 drawing referred to above. The dimensions and slope ratios on the drawing are identical to those given on Drawing No. 156-41000 for each of three different profiles, *i.e.*, road dip, fill section and cut section. This drawing clearly shows a 24-foot wide road from shoulder point to shoulder point except for the top profile of a road dip section which shows only a 20-foot road (10 feet from centerline) at dip sections, consistent with the dip section profile on Drawing No. 156-41000. As we have seen, Mr. McCabe crossed out the figure "10'" on each side of the centerline on the road dip profile and substituted the figure "12'," initialed the change, and indicated his approval at the bottom of the drawing (Tr. 129). He did not remember taking exception to any of the remainder of the drawing (Tr. 178), and never discussed the fact of his signing the contractor's drawing (B-10) with anyone in the Government (Tr. 222), nor the fact that he had changed the width of the

dip sections thereon (Tr. 284).¹⁵ The project diary makes no mention of his signing Drawing B-10.

Subsequent to the April 23, 1969 meeting, at which Mr. McCabe signed Drawing B-10, the record discloses no further difficulty with regard to grading. Appellant testified that he proceeded to drift the dirt back across the roadway (Tr. 348), and to build the road in accordance with Drawing B-10, *i.e.*, a road of 24-foot width. By letter dated May 5, 1969, he gave written notice to Mr. McCabe that he considered the changes in subgrade elevations and interpretations of design of typical sections to be compensable contract changes.¹⁶ The Government accepted the road on June 12, 1969. The Government did not offer any testimony or evidence regarding the actual width of the road that was accepted.¹⁷

Decision

It is apparent that the conflicting testimony referred to is founded on different interpretations of the specification requirements respecting the elevation and width of the road to be built.

¹⁵ Tr. 215 and 178. He changed the B-10 drawing to show a 24-foot wide road in the dip sections and did not comment on the remainder of the profiles showing a 24-foot wide road.

¹⁶ Item B-4.

¹⁷ The project engineer responded that he did not know, when asked the width of the finished road (Tr. 308). Additionally, the project diary entry for June 18, 1969, contains the statement: "Mailed 'as constructed' drws to DCSSC," which would indicate this information was readily available.

¹⁴ Appellant Exhibits 4A through 4L are photographs taken on April 23, 1969 (Tr. 53), and show the condition of the road at this time.

There is an obvious difference between Mr. Otake's instructions to Mr. McCabe to build the Schedule 1A road 2 inches lower and 25 feet wide, and Mr. McCabe's actions initially to permit the grade to be raised, then to stake a 24-foot wide road. There is no evidence that Mr. Otake's view was ever communicated to appellant; however, his advice to Mr. McCabe was cited as the basis for some of the instructions given to appellant.

From January 16 to March 12, Mr. McCabe and the Government inspector were present and acquiesced in appellant's work to conform to the plan profiles by raising the subgrade. According to Mr. McCabe this required the bringing in of borrow (Tr. 122).¹⁸ Both Mr. McCabe and the inspector testified concerning their knowledge of appellant's plan and actions to raise the subgrade.¹⁹ Yet, neither objected or required that the grade be lowered until March 12, after establishment of the subgrade elevation had been

substantially completed and fine grading was in progress.

We hold that the specifications were defective and ambiguous in that information was lacking regarding the means of converting the Schedule 1 drawings to Schedule 1A. However, the ambiguity was resolved by the Government's action in observing and permitting appellant to substantially complete the grading phase of the work, and approving the use of the extra borrow required. The appellant's work and the Government's knowledgeable acquiescence therein amounted to a contemporaneous interpretation of the contract. Subsequent instructions to lower the grade and the ultimate agreement to complete the road according to Drawing B-10 were contract changes.²⁰

The first change occurred on March 12, when Mr. McCabe ordered the grade to be lowered to the blue-tops. It is not clear whether this instruction resulted from learning of Mr. Otake's interpretation during the February 25-26 visit, or from an independently held view of the specification requirements. The

¹⁸ Borrow is a pay item in the contract schedule to be paid for at the actual quantity. The Government argues in its brief that both schedules called for the same amount of borrow and appellant should have known the subgrade was to be the same for either schedule. Appellant brought in the extra borrow during this period and was paid for it without objection. (Tr. 309.)

¹⁹ Mr. Quick testified as follows:

"Q. Was that (March) the first time that you found that any elevation you felt was too high?

"A. No. Because Mr. Jones (Appellant's foreman) came to me and told me that he was building the grade too low and he was going to raise it 2 1/2ths.

"Q. What did you tell him?

"A. I told him to follow the slope stakes, that is what they were put in for." (Tr. 331).

²⁰ *International Builders of Florida, Inc.*, FAACAP No. 67-5 (August 11, 1966), 66-2 BCA par. 5765; *Creative Arts Studio, Inc.*, FAACAP No. 67-10 (September 7, 1967), 67-2 BCA par. 6575, on reconsideration at p. 30,511.

"In the light of the foregoing, it seems clear that giving great weight to the contemporaneous conduct of the parties during the active phase of the contract and prior to the inception of the dispute was correct." Compare *Compec (A Joint Venture of Commonwealth Electric Co. and Power City Electric, Inc.)*, IBCA-573-6-66 (January 4, 1968), 75 I.D. 1, 68-1 BCA par. 6776.

latter is indicated since the instruction was to lower the grade without mention of widening it to 25 feet. Additionally, he continued to stake a 24-foot wide road and there is no evidence that he objected when appellant complied by plowing out a 20-22-foot trough. Appellant complied with the instruction, but advised that he considered it to be a compensable change.

On April 23, the grading requirements were again changed. Mr. Otake had visited the project on April 16 and 17, and told Mr. McCabe the excess dirt piled along the side would have to be removed. There followed on April 23, the revision and approval of Drawing B-10 showing a 24-foot wide road and the completion of the project in accordance therewith.

We also find that there were significant staking errors in the Government's placement of the blue-top stakes in the cut sections. This allegation is corroborated by the testimony of the engineering representative that these stakes all were placed too low. The impact of the staking errors and the unclear instructions given appellant by the designated Government project supervisor caused appellant to perform unproductive and extra grading work from early March until sometime after April 23, 1969, when the regrading had been completed.

Regarding the claim for extended performance time, the Government computed the contract period from November 13, 1968, rather than November 18, 1968, the date the receipt

of the notice to proceed was acknowledged. The Government did not offer evidence to show the notice to proceed was received earlier. Absent such proof, the date of receipt on the notice must stand. Appellant should be credited with the five days erroneously included in the Government's computation. This leaves 48 days of delinquency charged. There were 41 days from the time the first grading change began affecting performance upon the discovery of the "too high" grade on March 12, and the settling effect of the April 23 action by the project supervisor. These 41 days should not be charged to the contract time. After the agreement of April 23, more time was required to regrade seven miles of road. Seven days constitute a reasonable period for this work. Therefore, we grant the entire 48 days of additional performance time for accomplishment of the extra work.²¹

Respecting appellant's request for compensation for the extra work we note that the amount claimed totaling \$46,514.50, included costs of building super elevations on curves and the uphill haul for borrow, which we held, *supra*, were either abandoned by the appellant or failed for want of proof. He has established that extra work was occasioned by the staking errors in the erroneous placement of blue-top stakes in all cut sections, the widening of all dip sections by two feet,

²¹ Our holding makes it unnecessary to pass on appellant's claim for five additional rain days in February by letter dated May 9, 1969, and not answered by the Government. See Appellant Exhibit 7.

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and the changed grading requirements for which he is entitled to be compensated.

The two documents in the record relating to the extra costs incurred do not show any breakdown for the various claims.²² Neither do they provide any reasonable basis for allocation of such costs to each claim. The determination of an equitable adjustment is also complicated by the fact that the record of costs was not kept until March 21, even though the grading work was changed earlier in March. Additionally, some weight must be accorded the Government's challenge of these cost documents on the ground that the daily record extends two days beyond the date of completion of all paving.²³

While the unknown factors prevent a precise calculation of the compensation to which appellant is entitled, we do find that the evidence on costs and the duration of unproductive work and rework do provide a reasonable basis for a de-

²² Items B-11 and B-12.

²³ The project diary entry for June 4, 1969, notes that all the main road had been paved.

termination of the price adjustment by the jury verdict approach.²⁴ Therefore, considering the entire record and giving due weight to all offsetting factors, we hold that the appellant should recover an allowance in the amount of \$39,000. Additionally, appellant is entitled to a time extension of the entire 53 days requested.

Conclusion

The appeal is sustained in the amount of \$39,000 and an extension of the contract performance period of 53 days.

RUSSELL C. LYNCH, *Member*.

I CONCUR:

Sherman P. KIMBALL, *Member*.

²⁴ *Lincoln Construction Company, IBCA-438-5-64* (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234; *The Brezina Construction Company, Inc. v. United States, Ct. Cl. No. 68-70* (April 17, 1972), 17 CCF par. 80,882, quoting *WRB Corporation v. United States*, 183 Ct. Cl. 409 (1968): "Nor is the so-called 'jury verdict' countenanced unless 'there was clear proof that the contractor was injured and there was no more reliable method for computing damages * * *.' " Proof of injury to the appellant is clear. We find no more reliable method exists for computing damages than the jury verdict approach.

APPEAL OF R. H. FULTON, CONTRACTOR*

IBCA-769-3-69

Decided July 21, 1972

Appeal from Contract No. 14-06-D-4646, Specifications No. DC-5863, Canadian River Project, Texas, Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Warranties—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof
An appeal claiming the costs of repair of corrosion in four stainless steel clad surge tanks is denied where the Government has discharged its burden in show-

*Not in chronological order.

ing by a preponderance of the evidence of record that the most probable causes of corrosion were welding defects, not allowed by the specifications, and contractor's failure to protect the interiors of the tanks from weld and gouge spatter.

Contracts: Construction and Operation: Warranties—Contracts: Performance or Default: Inspection

The Government's remedies under an express warranty extending for three years after acceptance of the work are not vitiated by inspection and acceptance barring all but latent defects since warranty remedies are cumulative.

APPEARANCES: For appellant, John A. McWhorter, Attorney at Law, King & King, Washington, D.C.; for the Government, John R. Little, Jr., and William A. Perry, Department Counsel, Denver, Colorado.

OPINION BY MR. FONNER

INTERIOR BOARD OF CONTRACT APPEALS

This appeal involves the application of a contract warranty provision to the repair of four stainless steel clad surge tanks on the Canadian River Project of the Bureau of Reclamation. A purpose of the Canadian River Project is to supply water to Amarillo, Texas. To this end water must be made to run uphill from Lake Meredith to the Amarillo regulating reservoir. The lift is about 650 feet and is accomplished by pumps in conjunction with the four surge tanks. The specific functions of the surge tanks are (i) to act as a kind of pressure relief valve so that the pipe line

stresses are less, (ii) to keep the pipe line full of water, and (iii) to prevent damage due to separation of the pipeline water column.

The surge tanks are not small; they range in size from 18 feet 6 inches diameter and 130 feet tall, to 25 feet in diameter and 192 feet 6 inches tall. They are uniform, however, with respect to materials used and manner of construction, each being built of curved plates eight feet tall, fabricated of type 321 stainless steel clad to a carbon steel backing. All joints were welded. American Water Works Association Standard for Steel Tanks, Etc. D-100-59¹ was the governing code.² The contract also required that, "In the welding of stainless steel cladding, the electrodes used shall be such that the resulting welds shall have equal corrosion resistant properties to those of the stainless steel cladding being welded."³

Work under the contract was completed and accepted on September 27, 1965, and the surge tanks were subsequently put into service. Early in 1967 it was noticed that the floor of tank 2 was leaking. This tank was dewatered during the week of February 6, 1967, and numerous and widespread rust tubercles were observed on both the weld seams and the plate surfaces.⁴ Appellant was notified and alerted to

¹ Appeal File, Exhibit 27.

² See Specification paragraph 85, Appeal File, Exhibit 1.

³ Ibid.

⁴ Appeal File, Exhibit 22, Item C.

July 21, 1972

its responsibilities under Specification paragraph 67.⁵

⁵ "Maintenance Warranty of Pipeline

"For a period of 3 years after acceptance of the work, the contractor shall be responsible for the repair of all defects, leaks, or failures occurring in the pipeline for the aqueduct, including the steel pipe with mortar lining, fittings and valves for structures, steel surge tanks, from any cause whatsoever, except for such leaks, defects, or failures which are, as determined by the contracting officer, due to defects in Government-furnished materials, negligence in the operation of the aqueduct by the Government or its agents, acts of third parties, acts of God, or acts of the common enemy.

"The obligations of the contractor under this paragraph shall be enforceable against his surety or sureties for the performance bond under this contract, during the life of the contract and for 1 year after final acceptance of all work under the contract. Prior to final payment under the contract, the contractor shall furnish a bond in the amount of 5 percent of the total original contract price, to assure performance of the contractor's obligations under this paragraph after the expiration of the obligation under the performance bond, for the remainder of the maintenance period. The form of bond and the surety shall be satisfactory to the contracting officer.

"The contractor, upon notice from the Government, shall promptly commence and diligently prosecute the repair of any defects, leaks, or failures that develop during the 3-year maintenance period. The work of repairing any defects, leaks, or failures includes the necessary excavation, pipe repair, backfill, and replacement of any appurtenances destroyed or disturbed by reason of such work. Repairs as may be required, in the opinion of the contracting officer, shall be made by the contractor in such a manner as to cause the least practicable interference with the use of the pipelines in service. Any damage to roads and all other such improvements lying within the permanent right-of-way shall be repaired by and at the expense of the contractor, to a condition as nearly as practicable to the original condition. If the contractor fails or refuses to make required repairs or replacements with due promptness and diligence as determined by the contracting officer, the Government shall have the right to make repairs and replacements, and unless it is determined that the cost of the work is chargeable to the Government, the entire cost thereof shall be paid by the contractor and may be collected from the contractor or the

There is no dispute of consequence over the appearance of the corrosion as seen visually in the tank. There are, however, divergent interpretations of what was seen, and these divergent interpretations bear directly on the primary factual issue in the appeal—what caused the corrosion? According to a prior decision of the Board in this case⁶ the burden is on the Government to prove that the most probable cause of the corrosion was within the area of responsibility of the contractor under the warranty provision of the contract.

The salient visible feature of corrosion, as seen by Government witnesses, was the widespread occurrence of rust tubercles both along weld seams and on the plates. Behind the tubercles would be found small holes in the cladding with a larger cavity $\frac{1}{4}$ to $\frac{1}{2}$ inch diameter behind the small hole.⁷ These tubercles predominated along the weld seams, occurring every few inches.⁸ There were 5 to 10 tubercles on each plate.⁹ On the tank floors corrosion pits or tubercles seemed to appear only along the weld seams, and not

contractor's surety or sureties or both. The cost of furnishing the bonds shall be included in the unit prices bid in the schedule for items of work provided in the schedule. The contractor will be reimbursed the actual and necessary cost, plus 15 percent for profit and general expense of any work or materials pertaining to repairs or replacements that are found to be the responsibility of the Government. (Paragraph 67 was amended by Supplemental Notice No. 1.)

⁶ *R. H. Fulton, Contractor*, IBCA 769-3-69. (February 2, 1971), 71-1 BCA para. 8674.

⁷ Tr. 161-162.

⁸ Tr. 212, 331, 596.

⁹ Tr. 596.

generally on the plate surfaces such as seen on the tank walls.¹⁰ Dr. Klodt,¹¹ the Government's chief witness, believed that the tubercles on the wall plates reflected a pattern. If viewed from a position adjacent to the wall, the plate tubercles would appear aligned toward the upper reaches of the tank.¹²

The visual observations of Dr. Klodt were the most thorough made. He not only examined the tanks from the floor, but also was hoisted to the top in a painter's chair. He noted that below horizontal welds there was generally a dark area with a concentration of metal spatter and rust, and above the girth welds a lighter area of carbonate deposit.¹³ In the bottom courses he noted a large horizontal line about 27 inches below girth welds and almost directly beneath vertical weld seams.¹⁴ Dr. Klodt pointed out that all the metal spatter actually seen was stainless steel spatter. The patterns of alignment that he saw, and which he attributed to mild steel spatter, were composed solely of tubercles, rust spots, and rust streaks because the mild steel spatter from arc gouging had all, in his opinion, corroded away.¹⁵

Appellant's witnesses generally confirmed these visual impressions, but with some small differences. One witness felt that tank 4 had less cor-

rosion than tank 2.¹⁶ Appellant's witnesses saw no pattern of alignment of tubercles or rust spots on the plate surfaces, and accordingly, could not determine any association of such rust areas with metal spatter.¹⁷

The picture of corrosion testified to is vividly portrayed in a series of color photographs.¹⁸ These photos show various views of the tank interiors. It is obvious from the photos that extensive corrosion occurred along the weld seams, and that rust tubercles were scattered over the surface of the clad plate. Other features in specific photos will be referred to elsewhere in this opinion.

According to the record the actual erection of the four tanks seems not to have presented any unusual problems or difficulties. The tanks were erected by Pittsburgh Des Moines Steel Company (PDM), which also shaped the plate and floor sections, according to welding schedules and shop drawings approved by the Government in normal course.¹⁹ The Government made one significant change in the erection requirements by requiring 100 percent penetration of all welds.²⁰ This meant that seams on all plate over three-eighths inch thickness had to be back gouged. The back gouging had to be performed to create space for full penetration of weld metal into the joint.

¹⁰ Tr. 334.

¹¹ Dr. Klodt is a qualified metallurgist with learning and experience in both welding and corrosion.

¹² Tr. 331.

¹³ Tr. 331.

¹⁴ Tr. 332, 458.

¹⁵ Tr. 333, 374-376.

¹⁶ Tr. 598, 650.

¹⁷ Tr. 621, 652.

¹⁸ Appeal File Exhibits 30A and B to 40A and B.

¹⁹ Tr. 573, 584, Ex. A-11.

²⁰ Tr. 573.

The sequence of weld passes was elaborated in welding schedules submitted to and approved by the Government.²¹ The schedules themselves²² lay out the sequence of weld passes, indicate back gouging when necessary and the side from which performed. The schedules also indicate the joint edge preparation, and the results of testing a test plate assembly.²³ The basic sequence was to weld the outer mild steel side first, back gouge from inside where required, and then weld inside with stainless electrodes.²⁴ On the thickest plate there was a mild steel pass on the inside to eliminate distortion, otherwise the first inside pass was with enriched stainless 309 CB electrodes to take care of dilution with mild steel.²⁵ Final inside passes were with E-347 electrodes, equivalent in composition to 321 stainless steel.²⁶ Floor plates were welded from one side by two mild steel passes, one pass with 309 electrodes, and final passes with 347 electrodes.²⁷

There is no contention that the materials used in welding were defective, or that the approved planned sequence of execution was deficient. Nor has the Government directly challenged the qualifications of the welders. According to the testimony all the welders were duly qualified and certified, either

on the job or elsewhere.²⁸ The crew varied from four to eight welders, with average turnover.²⁹ At least two, including the foreman, had prior experience in welding stainless steel.³⁰ According to appellant's testimony the welders did a good job.³¹

A Government witness recalled metal spatter adhering to the stainless clad, and a pattern of spattering in the direction of the air blast during arc gouging.³² Appellant's witness noted that stainless steel spatter should be only inches from the weld and the gouge spatter would strike the walls and fall in an arcing pattern.³³ Such spatter should not be expected to adhere more than 3 or 4 feet from the weld.³⁴ Although appellant's witnesses were unable to see the pattern of alignment of mild steel spatter as reflected in tubercle formation as seen by Government witnesses, one of appellant's witnesses did see a gouge spatter pattern running diagonally in the dark areas below the girth weld in photograph exhibit 35-B.³⁵

It does not appear in the record that PDM took any specific precautions to protect the clad surface from stainless or mild steel weld spatter. Nor, except for wire brushing after each weld pass, and after back gouging,³⁶ was there any clean-

²¹ Tr. 575-576.

²² Ex. A-10A-F.

²³ Tr. 578-579.

²⁴ Tr. 580.

²⁵ Tr. 581.

²⁶ Tr. 582.

²⁷ Tr. 583.

²⁸ Tr. 73.

²⁹ Tr. 701.

³⁰ Tr. 687.

³¹ Tr. 590, 687.

³² Tr. 74-75.

³³ Tr. 622-623.

³⁴ Tr. 623.

³⁵ Tr. 624-625.

³⁶ Tr. 74, 689.

ing of the interior of the tank to remove rust and spatter after completion of erection.³⁷ A Government inspector suggested that the tanks be cleaned both to his supervisors and to PDM personnel.³⁸ PDM personnel did not think such cleaning necessary,³⁹ and the Government, while noting the suggestion at a high level,⁴⁰ never seems to have acted on the recommendation to have the tanks cleaned. The inspector was subsequently instructed not to be concerned with the question of cleaning.⁴¹

It was also testified that floor plates were put in last to avoid possible damage to them during the erection of the tank walls.⁴² Also instructions were given to the erection superintendent that all lugs used in tank erection be put on the outside of the tank.⁴³

In the erection of the upper courses of some of the tanks PDM used a traveling platform.⁴⁴ A Government witness testified to observing spatter hit the platform and bounce onto the steel cladding.⁴⁵ Another Government witness, Mr. Timblin, concluded that the heavy horizontal line of weld spatter observed below a vertical weld resulted from spatter bouncing off of this platform.⁴⁶ A PDM witness

pointed out that horizontal gouging spatter would be blown out beyond the cage, and very little would hit the floor.⁴⁷ The Government's position is creditable. The photographic exhibits do show a heavier concentration of spatter at a distance below horizontal welds which would roughly correspond to the position of the platform floor. This horizontal concentration is not continuous, however, being concentrated below vertical welds.⁴⁸

It was brought out at the hearing that the Government inspectors assigned to the job were not experienced in the inspection of welding and that PDM was aware of their shortcomings.⁴⁹ The inspectors relied heavily on the judgment of PDM personnel.⁵⁰ There is no evidence, however, that PDM overreached because of the known inexperience of the inspectors.⁵¹ On the contrary, the inspectors examined visually all weld seams.⁵² PDM personnel thought the inspection was very thorough for an AWWA code tank.⁵³

The specifications also required spot radiographic inspection of weld seams.⁵⁴ The inspectors learned how to read the radiographs on the job.⁵⁵ All weld defects noted in the radiographs were repaired.⁵⁶

³⁷ Tr. 692.

³⁸ Tr. 77, 95.

³⁹ Tr. 51, 77, 589.

⁴⁰ Exh. A-1.

⁴¹ Tr. 94.

⁴² Tr. 592.

⁴³ Tr. 700.

⁴⁴ See Exh. G-15.

⁴⁵ Tr. 69.

⁴⁶ Tr. 292-293.

⁴⁷ Tr. 697-698.

⁴⁸ Tr. 332, 458.

⁴⁹ Tr. 48, 59.

⁵⁰ Tr. 63-64, 69.

⁵¹ Tr. 84.

⁵² Tr. 84.

⁵³ Tr. 691; see also Tr. 88, 90.

⁵⁴ Exh. G-4, Summaries of radiographic inspection reports.

⁵⁵ Tr. 72, 693.

⁵⁶ Tr. 72, 693.

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In this case the finality of inspection does not bar the Government from asserting its rights under a separate warranty, since the remedies are cumulative.⁵⁷ On a factual level the quality and exactness of inspection seem of little relevance since the causes of corrosion alleged by the Government, *e.g.*, slag inclusions, undercutting and lack of fusion would not necessarily be seen on a visual examination, and would only randomly be picked up by a spot radiographic inspection. Inspection is totally irrelevant to appellant's theories regarding the causes of corrosion.

Two main theories have been offered to explain the corrosion. The Government's position is based on weld defects. Appellant's position is that the corrosion was caused by the environment to which the tanks were subject.⁵⁸ Before discussing these positions in detail, and analyzing the supporting evidence we will dispose of certain other hypotheses which have been offered to explain the corrosion. Among the latter are carbonate deposits, titanium inclusions, fit-up difficulties, bacteria, and silt deposits along the top of weld seams.

Titanium deposits, bacteria, and silt all suffer from the same defect: there is no factual evidence to support them. Dr. Kledt, who made the only metallurgical examination,

testified that he found no evidence of titanium inclusions in the stainless steel.⁵⁹ He testified on cross-examination that he found no evidence of any relationship between titanium oxides, nitrides or carbides, with corrosion pits.⁶⁰

Neither party has offered any evidence that there were any problems with fit-up of the plate sections, which, when coupled with the thin cladding, could provide corrosion sites. As to bacteria, there is no evidence that such corrosive bacteria were in the tanks.

That silt deposits along the upper surface of the weld seams provided sites for crevice corrosion (an oxygen deficiency cell corrosion) is only a theory; no witness testified to seeing such deposits on the weld seams. In Photo Exhibits 40A and 40B,⁶¹ where the weld seams are quite visible, there is no visual appearance of silt on the seams. There was an accumulation of solid materials on the floors of the tanks, but significantly, the plate areas of the floor did not suffer corrosion. The only corrosion on the tank floors was along the weld seams.

In reply to the Government's posthearing brief, appellant raised the argument that the lesser corrosion to the floor plates could be explained on the basis that the sediment on the tank bottoms caused the entire surface of the bottom plates to become oxygen starved, so

⁵⁷ *Appeal of General Electric Company*, IBCA-442-6-64 (July 13, 1965), 72 I.D. 278, 65-2 BCA par. 4974.

⁵⁸ Appellant's posthearing brief, pp. 36-42.

⁵⁹ Tr. 452, 498.

⁶⁰ Tr. 497.

⁶¹ Appeal File Exhibits 40A and 40B.

that differential oxygen conditions would have been avoided. The floor plates, therefore, did not corrode as profusely as they might otherwise have.⁶² The difficulty with this theory is that there were crevice corrosion pits and areas along the weld seams on the floor plates indicating that corrosion due to oxygen differentials in crevices did in fact occur. As stated elsewhere in this opinion, such crevice or pit corrosion is dependent also on a generally passivated plate condition, which in turn is indicative of sufficient oxygen to maintain passivity. The evidence does not indicate or support an oxygen starved general environment on the floor of the tank. The theory belatedly offered by appellant is not tenable.

The walls of the tank were extensively covered with carbonate deposits. The evidence shows that the carbonates in the water in the tanks would come out of solution at about 70 degrees Fahrenheit.⁶³ According to the testimony the carbonate was not a scale, but a tightly adherent layer.⁶⁴ It seems to be the opinion of all the experts that it did not itself cause corrosion.⁶⁵ Further, there is no evidence, apart from opinion, that links carbonate deposits with sites for crevice corrosion, or with any other type of corrosion.

The most extensive and complete investigation into the causes of the

corrosion in the tanks was done by Dr. Donald T. Klodt, the Government's chief expert witness. Dr. Klodt is a highly qualified metallurgist with experience both in welding and corrosion.⁶⁶ He was retained by the Government in the summer of 1967 to determine the nature, extent, and causes of the surge tank corrosion.⁶⁷ He was given great latitude in his investigation and no restrictions were imposed as to the conclusion to be reached.⁶⁸

In his examination, Dr. Klodt visually examined the interior of the tanks. In addition he selected samples of the steel plate and welds on the basis of his visual examination and radiographs taken in Tank 2 by PDM in early 1967, when the corrosion was first discovered.⁶⁹ The samples were examined by using metallographic techniques, including radiography, photography, and microscopy.⁷⁰ Dr. Klodt's investigation resulted in a report, dated November 18, 1967, submitted to the Bureau of Reclamation.⁷¹ In his report, Dr. Klodt described his sampling and examination techniques, his findings therefrom, and concluded that the corrosion of the welds was directly related to various weld defects such as slag inclusions, lack of fusion, and undercutting. Within the plate areas corrosion was attributed to weld spatter and grinding or gouging.

⁶² Tr. 318-321.

⁶⁷ Tr. 324.

⁶⁸ Tr. 323-325.

⁶⁹ Tr. 348.

⁷⁰ Tr. 349-350.

⁷¹ Appeal File Exhibit 22, attachment to Item F.

⁶² Appellant's posthearing reply letter dated July 7, 1972.

⁶³ Appeal File Exhibit 28-B.

⁶⁴ Tr. 340, 464-465.

⁶⁵ Tr. 284, 340-341, 760-762.

In his testimony Dr. Klodt essentially elaborated on his report. He explained that the corrosive mechanism was a kind of corrosion process called crevice corrosion. At the bottom of a small crevice passivation of stainless steel will deplete oxygen, establishing an electrochemical potential, with the crevice becoming an anodic area and the large area outside the crevice being cathodic.⁷² The corrosion current density is extremely high at the small anode (Tr. 358). The corrosion process produces iron hydroxide ($\text{Fe}(\text{OH})_2$) which is deposited away from the crevice and eventually oxidized to rust (iron oxide— Fe_2O_3).⁷³ This corrosion process can occur in a crevice totally within a stainless steel environment.⁷⁴

There is evidence in the record that there was mild steel spatter on the tank plates prior to their use.⁷⁵ It is apparent from photos and testimony that there was also stainless spatter. Dr. Glodt testified that several photos in his report showed corrosion associated with spatter.⁷⁶ He observed that loosely adherent spatter afforded a site for crevice corrosion, while tightly adherent spatter did not.⁷⁷ In addition, he pointed out that one of his photos showed that crevice corrosion could occur under the edge of a rust tubercle on the stainless cladding.⁷⁸ This point

was elaborated on cross-examination. Even though all mild steel spatter had rusted away, the rust left on the surface could cause corrosion of the stainless steel cladding by oxygen deficiency under the rust.⁷⁹

Dr. Klodt admitted that not all plate tubercles were caused by crevice corrosion initiated under spatter. Some, he thought, resulted from grinding or gouging of the cladding,⁸⁰ but he could only cite two occasions of such grinding seen by him, one on a floor plate, another on a wall plate.⁸¹ His opinion, nonetheless, based on his investigation was that corrosion tubercles in the center of the plates were the direct result of metal spatter on the plates.⁸² He thought corrosion from spatter could have been prevented by use of asbestos or canvas sheets against sides of walls, and by use of anti-spatter compounds.⁸³

This view that the walls could have been easily protected is supported by the American Welding Society (AWS) Welding Handbook, which points out the potential of corrosion danger from weld spatter,⁸⁴ and the desirability of protecting the plate surface from spatter.⁸⁵

We note here that Dr. Klodt himself pointed out that whenever corrosion has proceeded to any extent,

⁷² Tr. 354, 358.

⁷³ Tr. 354.

⁷⁴ Tr. 357.

⁷⁵ Tr. 75, 632.

⁷⁶ Tr. 366, 368, 371-372.

⁷⁷ Tr. 373.

⁷⁸ Tr. 372, Figure 49 of Report.

⁷⁹ Tr. 490, 500.

⁸⁰ Tr. 476.

⁸¹ Tr. 384, 477.

⁸² Tr. 378.

⁸³ Tr. 380.

⁸⁴ Exhibit G-20, Chapter 95.33.

⁸⁵ Exhibit G-20, Chapter 95.17.

it destroys the evidence of the initiation of the corrosion.⁸⁶ That observation certainly applies to corrosion related to welding defects and spatter.⁸⁷ The relating of defect to corrosion is, accordingly, necessarily circumstantial and inferential. In the Board's opinion, however, this observation also applies with equal force to any other physical circumstance suggested as a cause of the corrosion. But there is a fundamental difference between Dr. Klodt's connection of the corrosion with welding defects, and some of the other physical causes suggested by appellant. Dr. Klodt testified that he saw the kind of weld defects alluded to, and he connected the observed corrosion with the type of defect through his investigation. With respect to such causes as bacteria, silt on the weld seams, and improper fit ups, there is neither substantiating evidence that such physical conditions occurred, nor investigative evidence to connect them to corrosion sites. These latter "causes" stand only as opinion, unproved by fact. These inferences and conclusions to be drawn from Dr. Klodt's expert testimony are based on facts in the record.

Dr. Klodt observed undercutting⁸⁸ in the samples analyzed and apparent correlation of the welding defect with corrosion sites.⁸⁹ In his opinion undercutting materially increases the probability of corro-

sion.⁹⁰ On cross-examination, he agreed that undercutting is not a good site for crevice corrosion because undercuts generally have a rounded or smooth bottom; however, the corrosion problem is present if the cladding thickness is exceeded by the undercut.⁹¹

Although neither party has expressly addressed the issue, we are concerned about the fact that the specification cited⁹² by appellant as allowing undercuts appears in a section of the AWWA Code devoted to non-radiographic inspection, and there seemingly in the context of a specification applicable to partial penetration welds. The allowance of undercuts, to a maximum depth of one-thirty-second of an inch, is conditioned so that the unwelded portion of a partial penetration butt joint plus the undercut should not reduce the thickness of the weld joint by more than one-third of the thickness of the thinner plate.⁹³

The AWWA specification section for radiographic inspection of complete penetration butt joints, applicable to this job, states that any crack, incomplete fusion, or incomplete penetration is unacceptable.⁹⁴ In this section, no mention is made of undercuts, either to allow them or prohibit them. However, the definition of joint penetration given in the *Welding Manual* of the Bureau of Reclamation,⁹⁵ indicates that

⁸⁶ Tr. 414.

⁸⁷ Tr. 494.

⁸⁸ Appellant's posthearing brief, page 46.

⁸⁹ Appeal File Exhibit 27, Secs. 8.4 and 11.9.7, pp. 23 and 32, respectively.

⁹⁰ Appeal File Exhibit 27, Sec. A 12.1.a, p. 37.

⁹¹ Exhibit A-2, pp. 45, 46.

⁸⁶ Tr. 504.

⁸⁷ Tr. 403.

⁸⁸ In an undercut weld metal has not completely filled the weld groove, leaving a void space.

⁸⁹ Tr. 406-408, 411-413.

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joint penetration is measured from plate surface to the root of the weld. Under a specification requiring complete or 100 percent penetration of butt joints, weld metal should fill the joint completely (reinforcement, or weld metal above the surface of the plate does not count). It would seem that to the extent an undercut left a void between plate and weld nugget there would not be complete penetration at that point. Complete penetration would not allow undercuts, and it thus becomes understandable why the radiographic inspection specification omits mention of them. As a variety of incomplete penetration, undercuts are unacceptable when incomplete penetration is unacceptable.

The *Welding Manual* also indirectly supports this concept of undercuts as a variety of incomplete penetration when, in discussing radiographic inspection, it states that undercuts are unacceptable surface defects.⁹⁸ That the *Welding Manual* is concerned here with complete penetration joints is evidenced by its further references to the unacceptability on radiographic inspection of any incomplete penetration.⁹⁹ Accordingly, we cannot accept that undercuts without limitation, except as to depth, were permitted under the specifications in effect for this job.

We might say, in addition, that the AWWA specifications for non-

radiographic inspection requires complete penetration of all longitudinal (vertical) joints in cylindrical tanks, and allows no undercutting.⁹⁸ The same result obtains, in our view, under the radiographic inspection section simply by requiring complete penetration in all joints.

Slag inclusions were suggested as a source of corrosion. Dr. Klodt found a slag inclusion which apparently intersected the surface and provided a crevice or corrosion path into the stainless steel weld.⁹⁹ If, however, a slag inclusion did not intersect the surface it would not provide a corrosion hazard.¹⁰⁰ The role of slag inclusions as corrosion sites is marginal. Although the radiographs show numerous examples of inclusions,¹⁰¹ there is no evidence, apart from the single sample, to indicate that they intersected the surface.¹⁰² The fact that each weld pass was wire brushed would also minimize slag inclusions as a source of corrosion sites.¹⁰³ The AWWA specification allows for slag inclusions within certain limits and there is no evidence that the limits were exceeded.¹⁰⁴

Another potent source of corrosion, according to Dr. Klodt, was lack of fusion.¹⁰⁵ This was evidenced

⁹⁸ Appeal File Exhibit 27, Secs. 8.3 and 11.9.6, pp. 23 and 32, respectively.

⁹⁹ Tr. 414-415.

¹⁰⁰ Tr. 416.

¹⁰¹ Tr. 416.

¹⁰² Tr. 420, 637, 643.

¹⁰³ Tr. 644.

¹⁰⁴ Tr. 517.

¹⁰⁵ Lack of fusion refers to an incomplete fusion of the weld metal with the base metal.

⁹⁶ Exhibit A-2, p. 118.

⁹⁷ Exhibit A-2, p. 120.

by corrosion along the line of fusion of the weld.¹⁰⁶ Radiographs also showed line defects at edges of welds, associated with corrosion along that defect, which Dr. Klodt concluded resulted from lack of fusion.¹⁰⁷ The corrosion damage was pronounced beneath the weld in the base metal.¹⁰⁸ It was the radiographic appearance of a line defect with corrosion extending in both directions upon the line that led him to suspect lack of fusion.¹⁰⁹ If fusion were complete, a pit randomly started on the surface of the line of fusion could go straight through the cladding, and not extend along a line.¹¹⁰

Cross-examination also brought out that lack of fusion at the fusion line between weld metal and base metal is normally below the surface, but that the structural condition created by lack of fusion below the surface can result in a crack propagating to the surface.¹¹¹ Lack of fusion was not permitted by the specifications for the job.¹¹²

The testimony also refers to pits from arc strikes as a source of corrosion. Dr. Klodt's report included a sample showing an arc strike on the stainless steel surface which did not penetrate the stainless cladding and did not corrode.¹¹³ On cross-examination he stated that he observed frequent arc strikes along the seam,

of which one of less than a dozen samples showed penetration of the cladding.¹¹⁴ He estimated that one-fifth of the arc strikes penetrated the cladding.¹¹⁵

Dr. Klodt's expert opinion was that the corrosion in the surge tanks could be attributed to three causes: (i) weld defects, as based on his examination, (ii) metal spatter on the wall plates, and (iii) surface damage by arc strikes, gouging, or grinding penetrating the cladding. (Tr. 442.) The Board finds that Dr. Klodt's expert conclusion is supported by the preponderance of the credible evidence of record. His opinion leads directly to a conclusion of defective workmanship, and inadequate protective procedures.

Appellant's witnesses disagreed with some of Dr. Klodt's observations and conclusions. They failed to see any visual correlations of defects with corrosion from Dr. Klodt's photographs.¹¹⁶ Dr. Klodt's conclusions, however, were not based just upon his photos, but upon actual examination of the corrosion in the tanks, and his metallurgical examination of samples taken from the tanks. We do not think, under these circumstances, that a different reading of the photos in Dr. Klodt's report detracts from his credibility. Indeed, Mr. Bruno, one of appellant's experts, thought Dr. Klodt's investigation was sufficient¹¹⁷ even though he disagreed on an interpretative level.

¹⁰⁶ Tr. 421.

¹⁰⁷ Tr. 426.

¹⁰⁸ Tr. 425.

¹⁰⁹ Tr. 426-429, 520, Report figures 15, 37 and 38.

¹¹⁰ Tr. 521.

¹¹¹ Tr. 517-518.

¹¹² Appeal File Exhibit 27, Sec. A12.1, p. 37.

¹¹³ Tr. 385, 387.

¹¹⁴ Tr. 488.

¹¹⁵ Tr. 489.

¹¹⁶ Tr. 635, 636, 654, 765-768.

¹¹⁷ Tr. 759.

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A minor dispute of fact centers upon a series of radiographs taken in tank 2 by PDM in early 1967. These radiographs showed about 175 corrosion areas along 45 feet of weld seam.¹¹⁸ Dr. Klodt thought that the radiographs showed more corrosion sites along the center line of the weld seam, and that slag inclusions were prominent.¹¹⁹ He counted 40 or so sites along the bottom line of the weld seam in the radiograph and the rest along the center line.¹²⁰ As to whether the defects shown were on the inside or outside welds, Dr. Klodt testified that actual samples viewed with reference to the radiographs showed the defects to be on the inside seam.¹²¹ He agreed, on cross-examination, that from the radiograph alone it could not be told if defects were in the carbon steel or stainless steel, but since he knew from his examination that they represented corrosion sites that they were on the stainless side.¹²² He also noted, as additional evidence for his conclusion that the corrosion areas were predominately along the center line of the weld, that corrosion areas along the edge of the seam were hemispheric because the corrosion pit did not invade the stainless steel weld nugget, while in the center of the weld seam the corrosion site is more circular.¹²³

Appellant's witness, Mr. Sutter, did not think the radiographs particularly enlightening,¹²⁴ but disagreed that most defects were along the center line.¹²⁵ In his view, only 5 or 6 corrosion sites were along the center line, with about 40 along the bottom, and the remainder (about 130) along the top.¹²⁶ Mr. Sutter explained that the weld seam on the carbon steel side of the plate was wider than the inside stainless steel weld seam, so that the upper edge of the inside seam would appear in the radiographs as if it were in the center of a weld seam.¹²⁷

The series of radiographs was not placed in the record by either party, so the factual dispute cannot be resolved by independent examination, but only by assessment of the testimony. The dispute seems to be centered on the location of the greatest number of corrosion sites on the stainless steel weld seam. Both upper edge and centerline, however, seem to afford ample opportunity for crevice corrosion sites. Appellant's own witness remarked that both undercutting and lack of fusion would normally be found along the upper edge of the weld seam.¹²⁸ Lack of fusion could occur on the lower edge if the welder allowed the weld bead to roll over against the base metal without having melted the base metal.¹²⁹ Thus,

¹¹⁸ Tr. 550.

¹¹⁹ Tr. 401-402.

¹²⁰ Tr. 519-520, 543.

¹²¹ Tr. 544.

¹²² Tr. 545.

¹²³ Tr. 545-546.

¹²⁴ Tr. 601.

¹²⁵ Tr. 638.

¹²⁶ Tr. 639.

¹²⁷ Tr. 639-640, Exh. A-16.

¹²⁸ Tr. 645, 660.

¹²⁹ Tr. 660.

appellant's position that the bulk of the corrosion sites were along the upper edge of the seam corresponds directly with where one would expect to find the bulk of welding defects offering crevice corrosion sites.

The centerline could also afford crevices for corrosion. Examination of the welding procedure schedules¹³⁰ shows that the inside edge of the last stainless steel welding pass lies along the center line of the stainless steel weld seam. It would seem that the center line could be as equally affected by lack of fusion as the upper edge, and more so by slag inclusions intersecting the surface.

On this disputed factual item both parties present credible positions. We find Dr. Klodt's view more acceptable, being based upon personal observation of samples, and his radiographic readings utilizing the shape of the corrosion sites as indicative of position. Appellant's position seems based solely on a view of how to read the radiographs. We note, however, that although we resolve this minor factual dispute, it has no weight in our decision for the Government since either view, we think, tells equally against appellant.

In addition to his examination of the corrosion, Dr. Klodt conducted anodic polarization studies to determine the corrosivity of Canadian River water,¹³¹ using type 321 stainless steel clad plate, type 347 weld metal deposit, and water obtained

from surge tank number 1. The tests showed that both the stainless clad and the weld material passivated in both oxygenated and deoxygenated Canadian River water.¹³² That is, the stainless steel clad would not be expected to corrode generally in Canadian River water, but to behave as expected.¹³³ Dr. Klodt calculated a general thinning of the cladding (resulting from the continual renewal of the passive film) of one mill per year.¹³⁴ He also pointed out that passivity is directly related to availability of oxygen. If oxygen were depleted the stainless steel could become active generally in terms of corrosion, and one would expect a zone effect with greater corrosion at the bottom of the tank, but such effect was not observed.¹³⁵

Dr. Klodt admitted that such tests do not tell what caused the observed corrosion, but that the tests do say something about the corrosivity of the water and the character of the stainless steel.¹³⁶ Mr. Bruno, appellant's expert, disagreed that the polarization curve showed that the corrosivity of the water was not severe. He believed that the curve showed the passivity of the steel, but said nothing about the water contents which break down the passive film.¹³⁷ It seems to the Board that Mr. Bruno is only repeating Dr. Klodt's admission that the tests do not tell what caused the corro-

¹³² Tr. 435-436, 438.

¹³³ Tr. 438.

¹³⁴ Tr. 440.

¹³⁵ Tr. 441.

¹³⁶ Tr. 501.

¹³⁷ Tr. 771.

¹³⁰ Exh. A-10a-A-10e.

¹³¹ Appeal File Exhibit 22, Item I, pp. 4-9.

sion; such information must be sought elsewhere. But this does not detract from Dr. Klodt's conclusion that the water was generally not corrosive with respect to this type of stainless steel, in that the steel maintained passivity in a deoxygenated test environment.¹³⁸ As the Board views this evidence, the passivation tests in oxygenated and deoxygenated water test the character of the stainless steel with respect to oxygen passivation at its limits. But at the deoxygenated limit the test results are also the function of another variable, the degree of concentration of other agents in the water, such as chlorides, which could attack and destroy the passive film.

Apart from questioning Dr. Klodt's findings in detail, Appellant has offered his own explanations of the causes of corrosion. Some of these, such as bacteria and silt, we have disposed of earlier in this opinion. A main contention, however, is that the corrosion was initiated by chloride ion attack upon the stainless steel.¹³⁹

It is accepted that the chloride ion is quite corrosive on stainless steel. The chloride ion breaks down the passive film on the stainless surface and allows a small pit to develop. Positive ions are generated in the pit and more chloride ions are attracted to the site. Such a pit, once started, continues as long as the precipitating conditions persist.¹⁴⁰ The

active pit and the remaining passive surface set up an electrolytic cell almost comparable to that which can exist between stainless and mild steel.¹⁴¹ Chloride pitting or corrosion is mainly characterized by small holes scattered on the surface.¹⁴² Tubercles are not characteristic of chloride corrosion.¹⁴³

The issues are whether the facts support the appellant's theory, and if they are sufficient counter to the weight of evidence supportive of the Government's position. The following facts have been offered in support of the chloride ion as the main corrosive agent; (i) Canadian River water has a chloride content of about 250 parts per million, (ii) additional chlorine was introduced into the system, (iii) the water stood in the tanks for a long time, (iv) a solid stainless steel manifold also showed tubercle corrosion, (v) a similar tank at Cow Creek in California showed much less corrosion, and (vi) spectographic analysis of tubercles showed 2% chloride content.

Certain of these facts are not unequivocal. It is true that additional chlorine was introduced into the system, but apparently it would not have exceeded four parts per million at any time introduced through automatic chlorinators.¹⁴⁴ There is no evidence that this rate was ever exceeded or that chlorine was introduced by any other method. The ad-

¹³⁸ Tr. 438; Appeal File Exhibit 22, Item 1, p. 8, Figure 2.

¹³⁹ Appellant's posthearing brief, pp. 37-39, 49.

¹⁴⁰ Tr. 522-523, 735.

¹⁴¹ Tr. 737.

¹⁴² Tr. 798.

¹⁴³ Tr. 808.

¹⁴⁴ Exhibit G-38.

dition of four parts per million of chlorine gas to water containing 250 parts per million of chlorides seems *de minimis* with respect to adding to the corrosivity of the water.

It is not controverted that water stood in the tanks for relatively long periods of time.¹⁴⁵ This fact, however, would not increase the chloride content of the water. Its effect, if any, would be to reduce the oxygen content of the water available to maintain the passive film.¹⁴⁶ Dr. Klodt's passivity studies showed that type 321 stainless steel would passivate in Canadian River water, that is, there was sufficient available oxygen to maintain a passive surface, evidence from the pattern of corrosion itself indicates that the passive surface was maintained throughout the tank during the period of service.¹⁴⁷ If the surface did not stay passive, then corrosion would have been general instead of a pitting type.¹⁴⁸ But more to the point, there is no evidence as to the oxygen content required to maintain a passive film, nor of the oxygen content of Canadian River water, nor of the amount of oxygen which would be consumed to maintain the passive surface. While it may be true that 250 parts per million of chloride may be potentially very corrosive under conditions of low oxygen availability,¹⁴⁹ there is no indication that such condition occurred in the tanks. It cannot be

assumed that simply because the water stood in the tanks its oxygen content reached such low availability, particularly since the passive surface was maintained.

The solid stainless manifold, not of PDM origin or installation, also showed corrosion. The manifestation of corrosion in the manifold, according to several witnesses, also took the form of rust tubercles along the weld seams.¹⁵⁰ On the plate surface, a Government witness saw only one tubercle which had developed under the edge of a piece of tape left adhering to the tank wall.¹⁵¹ The other witness' testimony implied more than one such tubercle on the plate surfaces. The manifold corrosion was simply observed; no independent effort was made to ascertain its cause. As far as the Board can see, the corrosion that occurred in the manifold casts no light on the initiating cause of corrosion in the surge tanks. The manifold corrosion simply confirms that such corrosion can be initiated in and proceed on a totally stainless steel surface, a fact equally apparent in the surge tanks, which also were of a totally stainless steel interior. The initiation of corrosion in each was on a totally stainless surface. The only difference seems to be that on the surge tanks, once the stainless steel cladding was penetrated, the corrosion of the tank wall was accelerated by a galvanic corrosive reaction between the two

¹⁴⁵ Tr. 140-142, Exhibit A-6.

¹⁴⁶ Tr. 440-441, 736.

¹⁴⁷ Tr. 441.

¹⁴⁸ Tr. 771.

¹⁴⁹ Tr. 869-871.

¹⁵⁰ Tr. 271, 473, 627-628, 723.

¹⁵¹ Tr. 271-272.

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dissimilar alloys making up the plate.

Each side claims the manifold corrosion as evidence of its own theory, thus demonstrating how equivocal it is as evidence on the causes of corrosion. For the Government it reflects welding defects,¹⁵² for the appellant, the action of the environment.¹⁵³

The situation at the Cow Creek surge tank parallels that with respect to the manifold. The Cow Creek tank, a part of the Central Valley Project, was built under specifications practically identical to those used for the Canadian River tanks.¹⁵⁴ Again, tubercles were found along the weld seams, but far fewer than at the Canadian River tanks.¹⁵⁵ There was less spatter at Cow Creek,¹⁵⁶ and no carbonate scale.¹⁵⁷ Again, each side claims Cow Creek as evidence supporting its position. For appellant, the lesser corrosion reflects a cleaner environment in terms of silt and chloride ion concentration.¹⁵⁸ For the Government, the corrosion was again the result of welding defects.¹⁵⁹ The evidence from Cow Creek, in the Board's opinion, is equivocal. No careful, independent examination, apart from its bearing on the Canadian River tank cor-

rosion, was made of the corrosion at Cow Creek. On the present record the evidence from Cow Creek, like that of the manifold corrosion, does not help in ascertaining the initiating causes of the corrosion in the Canadian River tanks.

Appellant's expert, Mr. Bruno, cited the results of a spectographic analysis of a tubercle taken from tank number 2, which had been obtained on June 16, 1967, during an inspection of the tank. The analysis showed 2 percent chlorine.¹⁶⁰ He considered this sample to be significantly high in chlorine.¹⁶¹ Admittedly, the spectographic analysis does not indicate the form in which the atom originally existed.¹⁶² It further appears that once corrosion commences, particularly of the oxygen deficiency cell or crevice type, chloride ions, if present, are attracted to the anode and become involved in the corrosion process.¹⁶³ Although chloride ions could initiate pitting and corrosion, the presence of chlorine in the tubercles does not prove that it did.

As previously observed, the Canadian River water in the surge tanks may have had a concentration of 250 parts per million of chloride ions. Chloride ions can initiate pitting in stainless steel, and it is possible that some of the corrosion pits in the Canadian River surge tanks were initiated in this manner. On

¹⁵² Government posthearing brief, p. 11.

¹⁵³ Appellant's posthearing brief, p. 41.

¹⁵⁴ Exhibit A-13.

¹⁵⁵ Tr. 467, 615, 714.

¹⁵⁶ Tr. 553, 616.

¹⁵⁷ Tr. 555, 616.

¹⁵⁸ Appellant's posthearing brief, p. 41.

¹⁵⁹ Tr. 470-471, Government posthearing brief, p. 11.

¹⁶⁰ Exhibit G-3.

¹⁶¹ Tr. 727.

¹⁶² Tr. 801.

¹⁶³ Exhibit A-19, pp. 39-44.

the present record, however, the Board finds insufficient evidence to indicate that chlorine ion pitting was generally responsible for the corrosion as seen in the tanks. Two observed facts stand in the way of concluding that chlorides caused the corrosion generally. First, little or no corrosion was observed on the plate areas of the floors; there the corrosion was concentrated on the weld seams. Second, although tubercles were observed on the wall plates, they were primarily concentrated along the weld seams. Pitting and corrosion due to chloride ion attack should be more random and evenly dispersed.¹⁶⁴ The distribution of corrosion tubercles in the tanks contraindicates chloride ion attack as a general cause of the corrosion.

Appellant has also raised the question of design deficiency and defective specifications as contributing to the problem of corrosion, if not its cause. Two ideas take shape here. One is that the stainless cladding was too thin, the second that the wrong type of stainless clad was specified. The idea that the cladding specified was too thin for the job is related to the notion of fit up difficulties.¹⁶⁵ As we have previously noted, however, there is no evidence in the record of fit up problems.

A too thin cladding could conceivably make the welding procedure more difficult. But it must be kept in mind that PDM prepared the welding schedules itself in full

knowledge of the clad dimensions, and there is no evidence that the clad dimensions made the welding so difficult that defects were bound to occur. On the contrary, PDM minimizes defects.

The other aspect of specification deficiency is the assertion that the Government selected the wrong type of stainless steel, that 321-type stainless steel is more subject to corrosion than, say, 304-type stainless steel.¹⁶⁶ This fact, however, is not proof that 321-type stainless steel was deficient. The record shows, through Dr. Klodt's passivity tests, previously mentioned, that 321 stainless steel passivated in Canadian River water, and that the pattern of corrosion substantiated its passive character. On the positive side, it was testified that 304 stainless is inferior to 321 stainless where welding is involved because 304 stainless has greater carbide precipitation of chromium during welding.¹⁶⁷

Finally, although we have previously stated that the Government has the burden of proving by a preponderance of the evidence that the most probable cause of the corrosion was within the contractor's area of responsibility under the warranty, this does not relieve appellant of its own burden of producing positive evidence to support affirmative defenses in this case, such as defective specifications. At this point the risk of nonpersuasion is appellant's. It is not up to the Government to

¹⁶⁴ Tr. 798-799.

¹⁶⁵ Tr. 741.

¹⁶⁶ Tr. 739, 853.

¹⁶⁷ Tr. 261.

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disprove allegations or hypotheses that lack factual support in the record.¹⁶⁸

Having determined that appellant is responsible for the corrosion and for the cost of repairing the tank, we must decide if the Government's order to line the tanks with concrete was more than necessary, resulting in excessive costs to appellant's subcontractor. Several repair alternatives were initially considered. One, repair by welding the pits and corrosion sites was admittedly impossible.¹⁶⁹ A second, cathodic protection, was not considered possible because it would require opening up and cleaning out each corrosion pit.¹⁷⁰ The third, application of a special paint was considered by the Government and rejected, because it would have required opening up all the corrosion pits to remove retained water that eventually would have promoted disbonding of the paint.¹⁷¹

Fourth, vinyl fabric coating was considered and rejected because it was not possible to evaluate the permanence of the bonding material.¹⁷² Peel tests made by the Government on the vinyl fabric indicated that the bond was not very strong.¹⁷³ Weathering in the tank, and differential thermal expansion of the steel base and vinyl fabric also were cause for concern.¹⁷⁴

Fifth, a fiberglass lining was considered. A fiberglass mat or cloth would be bonded to the cleaned tank interior by a polyester plastic bonding agent.¹⁷⁵ In pursuance of this alternative Government personnel examined a fiberglass-lined oil storage tank at Dumas, Texas.¹⁷⁶ The oil tank had suffered corrosion from brine in the bottom portion and only this part of the tank had been lined.¹⁷⁷ However, using a Holiday detector, numerous pin holes were detected in the fiberglass lining of the Dumas tank.¹⁷⁸ Such pinholes could promote disbonding of the lining.¹⁷⁹

A fiberglass supplier was given samples of stainless steel to which he applied a proposed fiberglass lining.¹⁸⁰ Government personnel immersed the samples in a dip tank used for evaluating the bonding of protective coatings: all samples disbonded.¹⁸¹ Because of these problems fiberglass was rejected.¹⁸²

The Government also considered a mild steel liner with cathodic protection, and a stainless steel liner. Both were rejected as too costly.¹⁸³ A free standing fiberglass liner was considered, but such alternative was a new concept and would have required the development of new construction techniques.¹⁸⁴ The time

¹⁶⁸ *Jefferson Construction Co., ASBCA No. 7008* (June 5, 1962), 1962 BCA par. 3409.

¹⁶⁹ Tr. 213.

¹⁷⁰ Tr. 215-216.

¹⁷¹ Tr. 217-219.

¹⁷² Tr. 219-221.

¹⁷³ Tr. 222.

¹⁷⁴ Tr. 222-224.

¹⁷⁵ Tr. 224-225.

¹⁷⁶ Tr. 225-226.

¹⁷⁷ Tr. 226.

¹⁷⁸ Tr. 227-228.

¹⁷⁹ Tr. 229-230.

¹⁸⁰ Tr. 232.

¹⁸¹ Tr. 233.

¹⁸² Tr. 234.

¹⁸³ Tr. 235.

¹⁸⁴ Tr. 235.

available for repairing the tanks, which are part of a functioning municipal water system, did not allow for the development of materials and methods to effect such a solution.¹⁸⁵

On cross-examination, Mr. Timblin, the Government's witness on repair alternatives, was asked about coal tar enamel painting coupled with cathodic protection.¹⁸⁶ Mr. Timblin pointed out that coal tar is generally not suitable for above ground uses because it tends to soften when warmed by the sun.¹⁸⁷ It was also brought out that the Government was looking for a relatively long term repair solution,¹⁸⁸ that is, a solution which would still have some service left after the project had been paid for by its users in 50 years and turned over to them.¹⁸⁹ The Board cannot take as a verity that the Government was seeking a repair solution that would last 100 years. The evidence therefor, a hearsay admission, is too slim.¹⁹⁰

PDM itself did not recommend any repair methods because it felt that the causes of corrosion had to be determined first.¹⁹¹ The record shows, however, that PDM did not particularly exert itself to find the causes of the corrosion. Apart from

Mr. Bruno's brief examination of tank 2, and the retention of Corrosion Services, Inc., to investigate the possibility of stray electrical currents in the area,¹⁹² no other investigation of the cause of corrosion was made by PDM. If PDM was waiting to discover the cause of the corrosion before it made any suggestions for repair, it was bound to leave the choice of repair to the Government by default.

We do not think relevant to the Government's choice of repair the fact that in the subsequent year, 1968, PDM erected three tanks in Silver City, New Mexico, where the interior was coated below the water surface with hot coal tar enamel, and above with vinyl VR-3.¹⁹³ These tanks, apparently, were not stainless steel clad, and their use and service is not reflected in the record.

On the uncontroverted evidence in the present record, we can only find that the Government made a reasonable effort to explore and evaluate several methods of repair, and based upon the data available to it made a reasonable choice of repair method. Accordingly, appellant or its subcontractor PDM, is chargeable with the full cost of the repair job.

Having found factually that the corrosion was caused by crevice corrosion in weld defects and under

¹⁸⁵ Tr. 235.

¹⁸⁶ Tr. 295.

¹⁸⁷ Tr. 296.

¹⁸⁸ Tr. 297-298.

¹⁸⁹ Tr. 300.

¹⁹⁰ Tr. 897.

¹⁹¹ Tr. 603.

¹⁹² Tr. 603-604.

¹⁹³ Tr. 898.

weld spatter and appellant's responsibility, and that the Government ordered method of repair—concrete lining—was reasonable under the circumstances, there is no need for the Board to construe contract paragraph 67, and to answer the legal questions surrounding its interpretation. Under the factual findings herein made, appellant is responsible for the costs even under

its own interpretation of paragraph 67.¹⁹⁴

Conclusion

The appeal is denied.

ROBERT L. FONNER, *Member*.

WE CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

SHERMAN P. KIMBALL, *Member*.

¹⁹⁴ Appellant's posthearing brief, pp. 8-11.

JOHN D. HUFFMAN

7 IBLA 190

Decided September 7, 1972

Appeal from the decision of the District Manager, Coos, Bay, Oregon, January 27, 1971, in which demand was made for payment of the balance due under government timber sale contract.

Affirmed.

Timber Sales and Disposals

A timber sale is a lump-sum sale where the purchase price is not contingent on the volume of timber to be recovered. Where a timber sale contract provides for a lump-sum payment for removal of all trees marked with blue paint within a designated area, liability for payment may not be adjusted to the volume of the timber so designated and sold.

Timber Sales and Disposals

Where the BLM timber sale contract specifically disclaims the warranty as to volume, none arises.

Timber Sales and Disposals

A disclaimer of warranty of quantity in a BLM timber sale contract is not unconscionable pursuant to § 2-302 of the Uniform Commercial Code.

APPEARANCES: Leonard B. Netzorg, Esq., for appellant.

OPINION BY MR. STUEBING

INTERIOR BOARD OF LAND APPEALS

John D. Huffman has appealed to the Secretary of the Interior from the decision of a District Manager, Coos Bay, Oregon, dated January 27, 1971, in which demand was made for \$35,711.57; the remaining payment due to the Government under timber sale contract 14-11-0008(8)-247. This liability was arrived at by subtracting the amount already paid by Mr. Huffman from the total purchase price after giving credit for the timber remaining on the contract area and adding the balance due for road maintenance.

In his statement of reasons appellant raises several points pertaining to the relation between the volume of timber recovered and the contract agreement pertaining thereto.

These points will be considered in the order in which they logically relate to the disposition of the case.

First, appellant asserts that the sale in question was not a contract for a specific lot where the timber sold was to be identified by independent circumstances. Thus, the appellant reasons that the quantity specified governs the contract. Appellant bases his reasoning that the contract is one for a specific amount of timber on the fact that each tree which was to be sold was individually identified with blue paint on its trunk. Although the subject contract did not involve the sale of all the trees within a certain boundary, it did involve all the trees marked with blue paint within a set out area. Therefore, it was a contract for a sale of timber in accordance with circumstances independent of any volume estimation: *Brawley v. United States*, 96 U.S. 168 (1877); *Brock v. United States*, 84 Ct. Cl. 453, 459 (1937). Also, the contract of sale states in sections 1 and 37:

SEC. 1. *Timber Sold.* The government hereby sells to the Purchaser and the Purchaser hereby buys from the government, under the terms and conditions of this contract, all timber, except that reserved to the government under sec. 37 of this contract, within the area designated by the government, comprising the contract area and situated in the county of Douglas, State of Oregon * * *.

SEC. 37. *Timber Reserved from Cutting.* The following timber on the contract area is hereby reserved from cutting under the terms of this contract and is retained as the property of the Government:

a. All trees shown on the reserve area and previous sale areas on Exhibit A

and all blazed or posted trees which are on a marked boundary of the reserve area, except approximately eight hundred seventy-six (876) dead, down, or green Douglas fir trees, thirty-four (34) dead, down, or green hemlock trees, seventeen (17) dead, down, or green western cedar trees, four hundred seventy-five (475) snags, culls, and hardwood trees marked for cutting with blue paint on the stump in the approximate area in which trees are marked for partial cutting in reserve area as shown on Exhibit A * * *.

In addition, in relation to the gross sale nature of the contract, the purchase price is set as not being contingent upon the volume of timber logged. The method of payment is expressed as follows:

SEC. 3. *Installment Payments.* (a) This is a lump sum contract which may be paid in installments as set forth in this section. The following estimates are made solely as an administrative aid in determining when installments become due. * * *

The contract then goes on to set out the table of costs for the different types of timber to be removed. The contract continues:

Except as provided in § 2, *the Purchaser shall be liable for the total purchase price, even though the quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown above.* (Italics supplied.)

Thus, from the face of the contract it is apparent that the agreement is one for a lump-sum sale and not in any way dependent upon the amount of timber recovered. This result has been reached before in cases where the wording in the questioned contract was similar to that involved here, and the con-

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tract was held to be one for a lump sum. *Russell and Pugh Lumber Co. v. United States*, 290 F.2d 938 (Ct. Cl. 1961).

Appellant next raises the point of whether the designation of estimated amounts of recoverable timber in the prospectus and in the sale contract was itself a warranty of quantity. As discussed above, the sale was not for a specific volume. However, in support of his warranty contention, appellant cites *Everett Plywood and Door Corp. v. United States*, 419 F.2d 425 (Ct. Cl. 1969), which he asserts has changed the established law of BLM lump-sale contracts and now incorporates a warranty as to quantity when a volume estimate is set out in the prospectus and the sale contract. While many of the factual aspects of the two cases are similar, appellant himself points out the critical distinction. In *Everett* there was no express disclaimer of warranty as to volume, whereas in the present case the contract expressly provides that the purchaser shall be liable for the total contract price even though the quantity is less than that estimated.

In the *Everett* case the rationale and language of the decision shows that the lack of an expressed disclaimer was an essential point. The opinion states:

It is concluded that a warranty of quantity of timber was extended to plaintiff by defendant in the subject contract of sale under all of the relevant facts of circumstances in evidence, based primarily on the cumulative effect of the following facts:

1. The contract prepared by defendant, is [sic] prospectus of sale, and its cruise and sale report, all available to plaintiff before bidding, all stated that there was a total of 73,100 M board feet of merchantable timber to be cut on the sale.

2. None of such documents, nor any other issued by defendant prior to consummation of the sale, contained a disclaimer of warranty as to quantity, or any cautionary language to the effect that prospective purchasers should not rely on defendant's cruise estimate.

Finally, pursuant to the Court of Claims' holding in *Everett* applying the Uniform Commercial Code as a "federal" law of sales, appellant charges that the disclaimer clause in the present timber sale contract is void due to U.C.C. sec. 2-302 which states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be offered a reasonable opportunity to present evidence as to its commercial setting, in effect to aid the court in making the determination.

In the comment to the Code¹ provision on unconscionable contracts set out above, the Editorial Board²

¹ U.C.C. § 2-302, Comment 1. (1962).

² The Permanent Editorial Board for the Uniform Commercial Code to the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

stated that the test to be applied in using that provision to be one of whether:

* * * In light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. * * * The principle is one of prevention of oppression and unfair surprise * * * and not of disturbance of allocation of risk because of superior bargaining power.

Thus, the standard is one of "oppression and unfair surprise," with the needs of the particular trade and its commercial background being the primary evidence. Appellant is, as pointed out by his own brief, a logger of many years' experience. Therefore, he can hardly claim surprise in the methods and practices used by the BLM in conducting timber sales. In addition, as pointed out in the comment above, the unconscionability clause is not to be used to alter the risk inherent in any sales situation due to differences in bargaining power.

While not essential to the disposition of this case, we believe that a recitation of some of the facts might prove illuminating with reference to the appellant's contention that the denial of warranty was "unconscionable." First, appellant had four weeks from notice of sale until the sale date in which he could have made his own volume estimate. Second, he has contracted for five other BLM timber sales in the same area since 1963, indicating his familiarity with the terrain and phys-

ical conditions in the area, such as underbrush; as well as the terms of sale. Third, appellant worked on the completion of this contract during 1968, 1969, and 1970, having applied for and received an extension from November 1969 to November 1970. During the term of the contract he made no complaint regarding volume shortage, although on more than one occasion he complained that his operation was hindered by the state of the market. It was only after the extended term expired and a request for another extension was denied, when demand was made for the payment of the balance due that appellant raised the issue of volume.

The facts of timber sales in gross bear out the Government's assertion that it would be impracticable to try to carry out timber sales in any way other than for a set sum regardless of the volume involved. The Government states in its contract and prospectus that any volume estimates are to be regarded as an administrative aid only. The disclaimer clause is used not only because the sale is one for a lump sum but also because the nature of timber cruise reports are such that generally no two men will arrive at the same conclusion as to the volume of timber in a set area. Thus, the cases show that often there is as much as a one-third variation between the cruise report and the timber actually realized. *Russell and Pugh Lumber Co. v. United States*, *supra*, and cases cited therein. It should be noted that appellant asserts at most a 30 percent variation between the estimated recoverable amount of

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timber and the amount actually recovered.

In conclusion, the mere fact that all the trees to be cut were marked with blue paint does not require a finding that the sale was for a specific volume of timber. *Brock v. United States, supra*. Appellant's assertion that such "lump sum" sales have been altered by the effect of *Everett Plywood and Door Corp. v. United States, supra*, so as to create a warranty as to volume, must also be rejected; the distinction being that in this case the contract specifically disclaimed any warranty as to quantity, whereas the opinion in the *Everett* case relied heavily upon the point that there was no such disclaimer. Finally, appellant's contention that the disclaimer of warranty in this contract is unconscionable within the purview of section 2-302 of the Uniform Commercial Code cannot be sustained, as the "unconscionability clause" in the U.C.C. was drafted to protect against unfair surprise and to prevent oppression. Here, appellant is well versed in BLM timber sale practices and was provided with adequate written notice of the terms of sale. Moreover, the practice of not guaranteeing the volume of recoverable timber cannot be said to be oppressive, since it is well known in the trade that the volume which is recovered frequently does not correspond directly with the pre-sale estimates of volume. *Russell and Pugh Lumber Co. v. United States, supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

NEWTON FRISHBERG, *Chairman*.

CLEAR CREEK INN CORPORATION

7 IBLA 200

Decided September 11, 1972

Appeal from decision of Wyoming land office rejecting coal prospecting permit applications W-8894 through W-8901.

Reversed and remanded.

Coal Leases and Permits: Permits

A coal prospecting permit may be allowed where the Geological Survey reports that the lands are underlain by beds of coal which are too deep for economical mining in light of tremendous reserves of coal of comparable quality which are recoverable by less costly surface mining methods in the same vicinity.

Coal Leases and Permits: Permits

Rejection of applications for coal prospecting permits is properly reversed when the applicant presents persuasive and convincing evidence which clearly shows to be an erroneous determination of the Geological Survey that the lands sought are underlain by several thick beds of

economically workable coal deposits and are therefore subject to leasing only.

Coal Leases and Permits: Permits

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, the Secretary of the Interior is entitled to rely upon the reasoned opinion of his technical expert, the Geological Survey. Absent a clear showing that the Survey's determination was improperly made, the Secretary will not act to disturb the determination. However, a prospecting permit may be granted where there is no substantial evidence to support Geological Survey's opinion that the workability of coal underlying the land applied for is known. The "workability" of the coal is an economic concept.

Coal Leases and Permits: Permits: Workability

In determining "workability" in a coal prospecting situation the standard to be applied is set forth in the U.S. Geological Survey Manual, section 671.5.2(b), which points to earlier decisions of the Department stating that the workability of any coal will ultimately be determined by two offsetting factors: (a) its character and heat-giving quality, whence comes its value, and (b) its accessibility, quantity, thickness, depth and other conditions that affect the cost of this extraction.

Coal Leases and Permits: Generally

Neither statute nor regulation prohibits the granting of coal prospecting permits or leases which are limited to a specific depth, stratum, contour or horizon, and therefore, in view of the broad discretionary nature of the authority vested in the Secretary by the Mineral Leasing Act, the question of allowing such horizontally limited permits or leases is exclusively a policy determination.

APPEARANCES: Kirven and Hill, Attorneys at Law, for the appellant.

OPINION BY MR. STUEBING

INTERIOR BOARD OF LAND APPEALS

Clear Creek Inn Corporation has appealed to the Secretary of the Interior from a decision dated May 1, 1969, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Wyoming land office, rejecting appellant's several applications for coal prospecting permits filed pursuant to the prospecting provisions of the Mineral Leasing Act, *as amended* (30 U.S.C. sec. 201(b) (1970)).

Appellant's applications were filed September 22, 1967, for approximately 4,996 acres of land in Ts. 50, 51, & 52 N., Rs. 77, 78, & 79 W., 6th P.M., Wyoming. The applications were rejected by the land office on January 24, 1968, for the reason that the Geological Survey had reported that the lands included in the applications are underlain by several thick beds of coal capable of exploitation by underground mining methods. Although the Geological Survey reported that it had no information concerning the presence of coal deposits above the 3,700 ft. contour and would not object to issuance of prospecting permits for the open strata above the 3,700 ft. contour, the land office decision did not address itself to this possible al-

September 11, 1972

ternative. Therefore, it was determined that the applied for lands were subject to the leasing rather than the prospecting provisions of the Mineral Leasing Act.

On appeal to the Director, Bureau of Land Management, appellant took exception to the determination by the Geological Survey, pointing out that despite indications that coal existed, prospecting would still be required to demonstrate workability of the deep-seated deposits because there was insufficient information to show workability of the coal veins as a prudent business venture.

The land office decision was appealed to the Director, Bureau of Land Management, in accordance with the procedure then in effect. The Bureau's Office of Appeals and Hearings then requested a supplemental report from the Geological Survey. The Survey responded by a memorandum dated April 23, 1969, in which it reported that while it could be inferred that thick beds of coal lie at an elevation considerably below the 3,700 foot contour, the Survey has no knowledge of any coal beds of mineable thickness lying above that level on the subject land. The report further noted that the appellant had disclaimed any interest in the deep coal and is only interested in prospecting for any stripable deposits which might be present under shallow cover. The memo went on to say that the Geological Survey would have no objection to the issuance of prospecting permits to the appellant, provided

that such permits were limited so as to allow prospecting for coal only at elevations above the 3,700 foot contour level as depicted by the Sheridan, Wyoming; Montana, 1:250,000 scale topographic map prepared by the Army Map Service, Corps of Engineers. The memo then recommended certain stipulations and procedures to be followed in the event that such horizontally limited prospecting permits were allowed.

The Bureau's decision of May 1, 1969, affirmed the rejection of appellant's application, finding that appellant had not presented convincing evidence to show that the subject lands are not underlain by workable coal deposits, albeit at some depth. The decision held further that there is no provision in the Mineral Leasing Act or the implementing regulations which allow the issuance of coal prospecting permits for a zone horizontally separate from another zone in the same land which is known to contain workable deposits of coal which are subject to disposal only under the leasing provisions of the Act.

Upon appeal to this Board, appellant again challenges the validity of the Geological Survey's recommendations and conclusions, arguing, *inter alia*, that the reports as to existence and workability of deep-seated coal deposits are based upon inference and speculation and not upon professional knowledge. It contends Survey's methods of gathering such limited and scattered information from oil well logs are technically inadequate as compared

to the thorough coal testing programs generally accepted by the coal industry. Appellants argue that "workability" and mining feasibility need to be determined by core-drilling, supplemented by rotary-drilling with electric logging designed for coal strata determination. It also asserts charges of discrimination, citing the issuance of coal prospecting permits to Page T. Jenkins in March of 1967 on adjacent lands which appellant claims exhibit the same degree and character of coal.

Since appellant had devoted the major thrust of its appeal to a dispute of the Geological Survey's findings below, that agency was accorded an opportunity to respond to the arguments advanced in appellant's statement of reasons.

By a memorandum of February 18, 1971, the Geological Survey replied in more specific detail supporting its position set forth in its earlier reports. As for the technical sufficiency of the information gained from a study of electric logs run in oil well tests, the Survey noted that:

* * * only occasionally do coal prospectors now actually core seams in a particular prospecting program. This coring is done primarily to check against electric logging, which is the principal tool used to identify coal seams. Similar type electric logs have been used for years in oil drill holes for identifying and correlating the various penetrated strata. From these logs one skilled in their interpretation can identify the coal seams, determine their thickness and ascertain whether the coal seams contain interbedded rock strata of such thickness as

to be detrimental to the workability of the deposit. The logs of the wells show the existence of a number of thick coal seams which can be projected from the known coal beds on the Jenkins-Wold permits into and beyond the Clear Creek Inn area. Although there have been no oil wells drilled in Ts. 51 & 52 N., R 79 W., it can reasonably be inferred from the well-known great lateral extent of this coal zone that coal beds of mineable thickness also underlie this area * * *.

In addition, Survey pointed to other "nearby" coal development stating:

Approximately 25 miles east of the application area outcrops of thick coal beds in this broad structural basin are exposed for more than 70 miles in a north-south direction. The quality of the coal found in the Wasatch and Fort Union formations in the Powder River Basin is generally known or can be reasonably inferred. The Government has successfully leased large blocks of coal in recent years in this basin based only on the knowledge that coal exists in the lands in mineable quantity. In most cases there was no specific analysis of the underlying coal available, but none was needed to generate substantial competitive interest.

In its limited treatment of the central issue of workability of the coal deposits, Survey noted that

* * * as to whether the coal underlying the area here involved can be mined, it must be pointed out that today many coal seams thinner than these here involved are being developed by conventional underground mining methods at depths up to and exceeding 1,500 feet.

In a specific response to the charge of discrimination Survey submitted a detailed chronology of all the coal prospecting permit applications and the actions taken thereon in the vicinity of the Clear Creek Inn applications. A brief re-

view of this itemized summary of actions indicates that, although 13 permits were originally issued to Page T. Jenkins and John Wold in June of 1967, subsequent applications by the same permittees were rejected along with Clear Creek Inn Corporation's applications after the Survey had reconsidered available information and classified the lands as subject to leasing only. There was apparently no discrimination involved against the appellants by the issuance of these prior permits. However, the complete facts of these other coal prospecting permits are not before us for consideration. Moreover, to the opposite result, the fact that coal permits were previously issued on adjacent lands had a direct bearing on the rejection of all subsequent applications in light of the additional test information developed from these permit exploration programs.

It has been this Board's stated position that a charge of official discrimination against an applicant for coal prospecting permits, based upon an allegation that other lands known to be valuable for coal have been awarded to certain other permit applicants in the past, is not a proper basis for issuing coal prospecting permits for lands known to contain workable coal deposits. *George Brennan, Jr.*, 1 IBLA 4 (September 22, 1970). Therefore, in order for appellant to succeed in this instance, it must establish a case on its own merits to rebut the

Geological Survey's findings and to show a genuine need for further prospecting of the permit area.

A brief review of the salient facts shows the lands included in appellant's permit applications, filed in September of 1967, are located within the Powder River area of northeastern Wyoming. Approximately 25 miles east of this area are found thick outcrops of coal known as part of the Wasatch-Fort Union formations which are currently being strip mined. To the south, directly adjacent to one area of lands in questions, are the permit lands of Page T. Jenkins and John S. Wold. Although Jenkins and Wold had received their prospecting permits in June and July of 1967, both had conducted extensive testing on their permit lands prior to the filing of the Clear Creek Inn applications.¹ The Survey subsequently recommended rejection of the Clear Creek applications based on information drawn from several oil well drill logs in the permit area.

When served with a copy of the Geological Survey memorandum, appellant requested and was granted an opportunity to submit additional comments in rebuttal. By a letter of April 9, 1971, appellants submitted a critique of the Geological Survey position, prepared by its

¹ Geological Survey submitted a copy of an article from COAL AGE magazine, September 1967, titled "Project Thunderbird * * * A nuclear trigger for coal gasification", which discussed the coal testing program conducted by Wold and Jenkins.

own expert, the Paul Weir Company, of Chicago, Illinois.²

The Weir report maintains that the presence and workability of coal deposits cannot be ascertained without definitive information regarding continuity of coal currents and thickness, coal bed roof and floor characteristics, information regarding sterile laminations within the coal bed, and characteristics bearing on quality, such as ash and moisture content. It maintains that a program of comprehensive drilling is required to establish this data to a degree necessary to support a satisfactory conclusion.

We are of the opinion that the Geological Survey is not required to assemble such precise and definitive data, or to undertake comprehensive drilling programs, or to engage in other methods of extensive exploratory investigation in order to satisfy the requirement imposed upon it by statute for the purpose of making its recommendation as to whether prospecting permits or competitive leases are appropriate in a given area. The Survey is entitled to base its determination on the information available. See discussion, *infra*.

However, the Weir report is useful in its analysis of the data relied upon by the Survey, stating:

With respect to projections of the currents of thick coal beds from known outcrops north and south of Gillette (Wy-

oming) towards the west, the charts of electric logs of oil wells shown on figures 1 and 2, attached to the [Geological Survey] memorandum, dated February 18, 1971, do not show projections from such outcrops and, in addition, do not indicate that the thick beds present in the southeastern group of oil wells also occurred towards the northwest where the tracts under consideration are located.

The Weir Company report is at variance with the Geological Survey's conclusion as to workability of coal seams at depths up to and exceeding 1,500 feet. Weir specifically states:

Except in the anthracite fields, we know of only a few instances within the United States where unusually high quality coals are being mined at depths near or below 1,500 feet, in southwestern Virginia and Oklahoma, and these areas were comprehensively drilled before mining operations were undertaken.

Appellant, pointing to this opinion, then emphasizes that Wyoming coals are generally of a subbituminous nature and not "unusually high quality", which it contends adds further support for its need for a prospecting permit to determine the quality of the coal involved.

The Survey's memo of February 18, 1971, contained the following statement:

Records of the Geological Survey reveal that from April through June, 1969, 14 drill holes were completed on lands embraced in the 13 previously issued permits. Results of the drilling confirmed the existence of workable coal, based on analysis of core samples obtained. * * *

Because this statement expressed a conclusion on a pivotal issue, this Board requested the Survey to pro-

² A brochure submitted by appellant on the operations of the Paul Weir Company indicates that it specializes in mining engineering, geology and economics for underground and surface mining.

vide more specific data regarding the locations of the drill holes, the depths at which coal was encountered, the kind and quality of coal, the method of correlation by which a projection of such deposits into the subject lands may be inferred, the information disclosed by the core holes relative to extraneous geological conditions referable to the excavation of shafts, roof conditions, subterranean waters and other developmental factors, and an expression of the Survey's opinion of both the presence and the workability of coal on the lands applied for with particular regard for the guidelines set forth in the Geological Survey Manual at section 671.1.5.2(b).

The Survey responded by a memorandum dated May 19, 1972, accompanied by a map showing the relative locations of the 14 drill holes to the permit areas applied for. The drill holes were sited on the Jenkins-Wold permits which are adjacent to the southeast of the two separate areas sought by appellant, so that while the nearest drill hole (No. 10) is within a half-mile of the southernmost tract, it is approximately 13 miles from the nearest boundary of the northernmost tract, and 17 miles from that tract's farthest boundary. The most remote drill hole (No. 14) is 13 miles from the nearest boundary of the nearest tract sought by appellant and 25 miles from the nearest boundary of the northernmost tract applied for.

The memo reports that the drilling program described encountered

five seams of coal at depths of from 1,000 to 2,300 feet. The seams vary in thickness from about 10 feet to more than 100 feet. The coal is classified as subbituminous C, having an average heating value of about 9,400 BTU. The method of correlation is explained in the memo, which also reports that the coal seams lie between normal sandstone and shale beds and that there is no reason to anticipate that the mining of these beds would encounter any problems other than those generally expected to be found in the deep mining of coal in any other area of the west.

Under the Mineral Leasing Act the leasing of coal lands is discretionary with the Secretary of the Interior. Section 2(b) of the Act, *supra*, authorizes the issuance of prospecting permits only where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area. It has long been accepted that it is for the Secretary or his delegate to determine whether, from the information which he has at the time he considers an application for prospecting permit, prospecting or exploratory work is necessary to determine the existence or workability of coal deposits. *D. E. Jenkins*, 55 I.D. 13 (1934). Of course, we recognize that the Geological Survey in conducting its field examinations and collection of other data is acting as the Secretary's expert and is providing technical advice so that a proper determination can be made in these matters. In addition, the Director of

the Geological Survey has been expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." Act of March 3, 1879, 20 Stat. 377, 394; 43 U.S.C. sec. 31 (1970). Therefore, when the Geological Survey has concluded from all the available geological data that further exploration is, or is not, needed to determine the existence or workability of coal deposits in a particular area, the Secretary is entitled to rely upon the reasoned opinion of his technical expert in the field. *Roland C. Townsend*, A-30142, A-30250 (September 14, 1965); *Carl Nyman*, 59 I.D. 238 (1946).

This accepted procedure has been followed consistently, placing a burden on the applicant to present a convincing and persuasive argument to rebut the conclusions of the Geological Survey. Absent a clear showing that the Survey's determination was improperly made, the Secretary will not act to disturb a mineral classification or determination made by the Geological Survey, *Cf. Lillie Mae Yates*, A-26271 (February 8, 1952).

In this case appellants have presented an argument supported by expert opinion to the effect that the existence and/or workability of the deep-seated coal deposits involved in this case are questionable and uncertain. We find that even considering the subsequent information of further exploration work conducted on the adjacent permit lands of Jen-

kins and Wold, the evidence is such that the workability of the coal deposits underlying the land is still in question. Therefore, even though the Secretary has a right to rely on the report of the Geological Survey without further question, he may examine the merits of the respective positions where the applicant has presented an apparently convincing rebuttal of the Survey's conclusions.

In this instance we are faced with a difference of opposing expert opinions in their divergent interpretations of the same basic technical information of record. In evaluating these opposite views, however, the crux of the case centers on the determination as to what standard is to be applied in judging "workability" in a coal prospecting situation. The U.S. Geological Survey Manual, section 671.5.2(b), specifically sets forth guidelines for this standard as set by that agency which point to earlier decisions of the Department stating that the workability of any coal will ultimately be determined by two offsetting factors. (a) Its character and heat-giving quality, whence comes its value, and (b) its accessibility, quantity, thickness, depth and other conditions that affect the cost of this extraction. The Survey manual cites *Emil Usibelli, A. Ben Shallit*, A-26277 (October 2, 1951), in which the Department specifically defined the term "workability," stating:

It must be considered coal if its value as determined by its character and heat-giving quality, exceeds the cost of extraction, either as judged by actual experience at the point where it is found

or as judged by actual experience on similar coals similarly situated elsewhere. There are no absolute limits to any of the factors. The mining of one-inch of coal that may involve the mining of three feet of rock is physically possible but would not pay. Most unworkable coal beds lacks one or more of three things—quality, thickness, accessibility—that is, they are too poor, too thin, or too deep.

From the foregoing it is apparent that the economics of the extraction process are critical to the determination of the workability of the coal. It is not enough to ascertain that coal is present and that mining it is “physically possible.” If it is too thin, too poor or too deep to mine it cannot be considered workable. To be workable its value must at least appear to exceed the cost of its extraction.

The *Usibelli* definition affords the basis for the resolution of this appeal when viewed in the light of the conclusion stated in the Survey’s memorandum of May 19, 1972, as follows:

It can reasonably be inferred that the lands involved in Clear Creek Inn’s application are underlain by a number of coal beds of minable quality and quantity. It must be pointed out that today many coal seams thinner than those found here are being exploited by conventional underground mining methods at depths up to and exceeding 1500 feet. However, we do not contend or imply that the coal seams underlying these lands can be economically mined today because of the tremendous reserves of coal of comparable quality found in this area which is amenable to recovery by much less costly surface mining methods.³

³ Member Goss believes that this statement is critical to the case.

In applying the Geological Survey’s traditional standards for determining workability of such mineral deposits, the Department has consistently recognized and accepted evidence of adjacent workable coal deposits and of geologic and other surrounding and external conditions to provide the basis for a determination based on a geologic inference. It has not always been required that actual disclosure of coal on the lands in controversy be established in order to prove either its presence or workability. The Department has long recognized and accepted such criteria as proximity to operating mines, location of land in known coal fields, and the character of coal beds in adjacent lands in its adjudication of applications for coal prospecting permits. *Sinclair Mines, Inc.*, A-27160 (August 18, 1955); *George Brennan, Jr.*, *supra*; see also, *Don C. Roberts*, 41 L.D. 639 (1913); *Morris Kline*, A-27651 (October 29, 1958)—for competency of evidence of operating mines in the nearby area; *John Smalley*, A-24166 (August 15, 1947)—bed of commercial coal on adjacent land. It has also been held that it is not necessary that such detailed information be available concerning coal deposits that the determination can be made with some degree of assurance that a mining operation will be an economic success. *Claude P. Heiner*, 70 I.D. 149 (1963); *Colorado-Ute Electric Assn., Inc.*, A-29964 (February 20, 1964).

The Department, when considering phosphate prospecting permit applications, has likewise rejected applications where the Geological Survey had determined, on the basis of evidence of existing workable deposits on adjacent lands and geologic and other surrounding and external conditions, that the lands applied for contain workable deposits.⁴ *Atlas Corporation*, 74 I.D. 76 (1967); *Elizabeth B. Archer*, A-30795 (November 17, 1967); *American Nuclear Corporation*, A-30808 (March 5, 1968). The Department has taken the position when dealing with both phosphate and coal that information need not specifically describe the deposits in the lands applied for, where detailed information is available regarding the existence of a workable deposit based on adjacent lands.

It is our view that a reasonable interpretation of the information of record would not admit an extension of the Survey's conclusion as to workability from the test information developed on the adjacent lands or from the information known from the strip mining area 25 miles to the east. It is quite evident from our review of the case law that the Department has always been willing to extend a workability determination by extrapolation where detailed information was available as to coal development on adjacent lands or where coal leases

or operating mines existed within reasonably close proximity to the application area. Under the circumstances presented by the instant case, however, we cannot say that the information Survey has gathered is such as to foreclose further consideration of the issue of workability of the deposits.

On the basis of the data available, the presence of coal beds, their thickness, grade and depth may reasonably be inferred, at least on the southernmost of the two large tracts covered by appellant's applications. The evidence of coal underlying the northern tract is not as strong, and there is a better basis for holding that its presence is in doubt. But even if we assume that no doubt exists that the same beds of coal underlie both areas, the mere presence of coal is not enough to bring the lands within the competitive leasing provision of the Act. The "workability" of the coal must also be reasonably well established. As noted above, the workability of coal is an economic concept. This is entirely logical when it is remembered that the determination is made to serve an economic purpose. The statute and regulations do not anticipate that competitive interest would be inspired by the presence of coal where the cost of its extraction would obviously exceed its value because it was "too poor, too thin or too deep." Notwithstanding the knowledge (actual or inferential) that such uneconomic deposits are present, it is still appropriate to permit prospecting, the object being

⁴ The language of section 9 of the Mineral Leasing Act governing phosphate prospecting permits is identical with that governing the issuance of coal prospecting permits in section 2 of the Act.

to find deposits which *are* susceptible to economic development.

While the presence of coal in the subject lands may be known inferentially, the Geological Survey readily acknowledges that it cannot be economically mined. The evidence of both sides supports a finding that the grade is too poor to be mined at the assumed depth. It is classed as subbituminous, an inferior grade which ranks just above lignite in types of coal. *A Dictionary of Mining, Mineral, and Related Terms*, Bureau of Mines (1968). This agrees with the Weir report, which states that except in the anthracite fields, the firm knows of only a few instances within the United States (in southwestern Virginia and Oklahoma) where coal is being mined at depths near or below 1,500 feet, and there the coal is of unusually high quality and the areas involved were comprehensively drilled before mining operations were undertaken. Moreover, appellant disavows all interest in attempting to mine this coal at the depths indicated by the Survey. There are no proved operating coal mines in the immediate vicinity or within reasonably close proximity to the lands applied for.

We conclude from the foregoing that there is no substantial evidence to support the view that the workability of the underlying coal is known.

The Survey points out that knowledge of the occurrence of coal in the Wasatch and Fort Union formations has been the basis for

past leasing in the area, and that even though there was no specific analysis of the underground coal available in most instances, "none was needed to generate substantial competitive interest."

The existence of substantial competitive interest is not the criterion which determines whether coal leases may be offered at competitive bidding. It is understandable that two or more competitors might be interested in bidding for the right to seek to produce coal from lands where coal is known to occur rather than attempt to secure a prospecting permit, even though they have no knowledge that workable coal deposits exist. This is analogous to our oil and gas leasing program where, despite intense competitive interest, "wildcat" lands are leased noncompetitively, and competitive leasing is limited to those lands which are within the known geologic structure of a producing oil or gas field.

Accordingly, we conclude that the law does not require competitive coal leasing in this instance and that the issuance of prospecting permits pursuant to appellant's applications is not barred, all else being regular. Collaterally, we might observe that neither is the issuance of such permits mandatory. The Secretary, or his delegate, may exercise discretion in this regard. He may decline to issue the permit for any reason consistent with the public interest. For example, if it may be foreseen that additional information concerning these deposits may be developed through other studies or activities,

he may elect to reject these applications in the anticipation that the public interest will better be served if action leading to disposition of the resource is deferred. Similarly, the applications might be rejected for reasons unrelated to the extent of the knowledge of the presence of workable coal, such as environmental considerations or impending disposal under another provision of law. See *Elgin A. McKenna, Executrix, Estate of P. A. McKenna*, 74 I. D. 133 (1967).

The remaining unresolved issue concerns the alternative proposed by the Geological Survey, *i.e.*, the granting of prospecting permits limited to the area between the 3,700 foot contour and the surface. As noted in the decision below, neither the statute nor the regulations provide for horizontal limitation. Conversely, we cannot interpret the law or regulations as prohibiting the granting of permits and leases limited to specific horizons. We are aware that while the practice is most uncommon in the Department, a few instances of horizontally limited leasing have been approved in the past. Authority to limit oil and gas leases to certain horizons, strata or depths has been recognized in the Mineral Leasing Act where unit or cooperative agreements are involved. See *Solicitor's Opinion*, M-36776 (May 7, 1969). Similarly, the Department has held that the Secretary is authorized to approve an assignment of a limited horizontal zone of an oil and gas lease issued under the Outer Continental Shelf Lands Act, and that approval of

such an assignment creates a separate and independent lease of the assigned portion. *Continental Oil Company, et al.*, 74 I.D. 229 (1967). The most recent example of horizontal leasing is in the limited sodium leases issued in the Piceance Basin area of Colorado. The uniqueness of each of the cited examples is recognized.

Finding that the law neither specifically provides for nor proscribes issuance of a horizontal prospecting permits or leases, and in view of the broad discretionary nature of the authority vested in the Secretary by the Mineral Leasing Act,⁵ the question of granting a horizontal prospecting permit appears to be exclusively a policy determination. See *Solicitor's Opinion*, 65 I.D. 305 (1958).

In weighing the question, the following might be considered: the horizontal division of lease or permit areas could (1) influence the value of the unleased portion for later competitive leasing, (2) create surface use conflicts between multiple lessees, (3) require extensive operational coordination between lessees for safety, (4) increase the administrative burden for accounting, record maintenance, inspections, etc. On the other hand, this form of leasing, where appropriate, might afford the most expedient and efficient means of extracting the resource, yield a greater revenue, and better serve the interests of conservation.

⁵ *Boesche v. Udall*, 373 U.S. 472 (1963).

(SAM E. HILL)

September 15, 1972

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed and the applications are remanded to the Bureau of Land Management for further adjudication consistent herewith.

EDWARD W. STUEBING, *Member*.

WE CONCUR:

JOSEPH W. GOSS, *Member*.

MARTIN RITVO, *Member*.

ESTATE OF SAN PIERRE KILKAKHAN

(SAM E. HILL)

1 IBIA 299

Decided September 15, 1972

Appeal, in lieu of a second petition for rehearing to present newly discovered evidence, after one rehearing already held.

REMANDED.

105.1 Indian Probate: Administrative Procedure: Applicability to Indian Probate

Examiners must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. sec. 557 (1970) and include findings of fact and conclusions of law in their orders and decisions in Indian probate.

105.2 Indian Probate: Administrative Procedure: Official Notice, Record

No official notice of records can be taken if such record is not introduced in evidence, or identified as required by the Administrative Procedure Act, 5 U.S.C. sec. 556(e) (1970) so as to be available subject to challenge by the aggrieved party.

225.1 Indian Probate: Evidence: Conflicting Testimony

The basic rule that the examiner's findings of fact will not be disturbed where there is conflicting testimony has no application where it does not appear the decision was based upon examiner's particular observation or evaluation of the witnesses or the statements made by them and he made no finding regarding the credibility of the witnesses.

225.2 Indian Probate: Evidence: Hearsay Evidence

Hearsay evidence is admissible as an exception to the general rule where it pertains to matters of family history, relationship and pedigree.

260.0 Indian Probate: Hearing Examiner: Generally — 381.0 Indian Probate: Secretary's Authority: Generally

The rule that a trial examiner's findings should not be disturbed on appeal unless "clearly erroneous" is not applicable by administrative appellate tribunals, but pertains only to judicial review by the courts.

APPEARANCES: Richard B. Price of Nansen & Price for appellants; Robert D. Dellwo of Dellwo, Rudolf and Grant, for appellees.

OPINION BY MR. MCKEE

INTERIOR BOARD OF INDIAN APPEALS

San Pierre Kilkakhan or Sam E. Hill, Colville Allottee S-1078, died

intestate February 2, 1967, and the first hearing in the probate of his estate was held August 15, 1967, at which time no parties in interest were represented by counsel. At that hearing Alice May Tatshama appeared claiming to be a daughter of the decedent and Lillian Williams Tatshama.

By his order determining heirs issued September 14, 1967, the examiner disallowed her claim and held that the decedent had died intestate, unmarried without issue, father, mother, brother, sister, or issue of deceased brothers or sisters. He determined that decedent's heirs, "second cousins" in the fifth degree of relationship, Hattie Condon Marquez and Alfred McCoy, were to share equally in the estate. The record shows them to be a grand niece and grand nephew of decedent's mother Madeline Louise Kilkakhan (Quin-ho-pe-tsa).

At the hearing a claim of relationship to the decedent was presented by Madeline Bone Wells and Sarah Bone McCraigie, representing themselves, a nonappearing brother, Joseph Bone, and the heirs of any of their other brothers and sisters who might be dead. Their allegation was that this decedent was the son of Edward Kilkakhan, and Madeline Louise Kilkakhan (Quin-ho-pe-tsa) both deceased. They allege that their own father, Narcisse Jim or Bone was a maternal half brother to Kilkakhan, father of Edward Kilkakhan.

The examiner's ruling in the first order of September 14, 1967, was

that the claim of relationship as first cousins by Madeline Bone Wells and Sarah Bone McCraigie is " * * * not supported by any of the records of the Department. The preponderance of the evidence is to the effect that decedent's father, Edward Kilkakhan had no brothers or sisters."

The appellants herein obtained the services of the law firm of Wicks and Thomas who filed appearances on February 29, 1968, and petitioned for a rehearing which was granted by order entered March 14, 1968. The rehearing was held on May 21, 1968, and the appellants appeared by Mr. Wicks. The examiner indicates in the order reaffirming the original determination of heirs entered March 11, 1971, that, " * * * the persons found to be heirs in the original Order were also present, but did not present any testimony or witnesses." The record of the hearing includes a stipulation between Mr. Wicks and the appellees as follows:

It is further stipulated and agreed among the parties hereto that Hattie C. Marquez and Alfred McCoy are related to the decedent as shown in the original order.

The record does not disclose whether Mr. Robert Dellwo, attorney for the two designated heirs, appeared at the rehearing or that he participated in the stipulation although his appearance was filed May 3, 1968, prior to the rehearing.

In his order after the rehearing reaffirming the original order determining heirs, the examiner made the following findings and stated:

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As stated in the original Order, the allegations of the Petitioners are not supported by any records of the Department of the Interior, in that Quin-ho-pe-tsa was the mother of Narcisse Bone (Barcisse Jim), a Canadian, who died in 1926, and that Quin-ho-pe-tsa was also the mother of Edward Kilkakhan, who was the father of the instant decedent.

The pertinent part of the testimony of the witnesses as to decedent's ancestry is based on *hearsay*.

The relation of Hattie Condon Marquez and Alfred McCoy is substantiated by the records of the Interior Department and testimony presented in the original hearing. Petitioners have stipulated that the relation of these 2 persons to the decedent is as shown in the Original Order Determining Heirs. (*Italics supplied*)

The record before us includes an exchange of correspondence between the examiner and the law firm of Nansen and Price who have not yet filed an appearance herein although they signed and filed the notice of the appeal by Sarah Bone McCraige and Madeline Bone Wells. The record further includes a petition for a second rehearing which was filed simultaneously with the notice of appeal on January 19, 1972. Both Mr. Wicks and Mr. Thomas have been separately appointed to the bench of the Washington Courts and do not appear here for the appellants.

The petition for a second rehearing is based upon new evidence in the minutes of the Enrollment Committee of the Colville Reservation discovered very recently by the efforts of Nansen and Price. It appears this evidence would tend to substantiate the position of Made-

line Bone Wells, *et al.* Under the provisions of 43 CFR 4.241(e) successive rehearings are barred, and the examiner was without jurisdiction to grant the petition for rehearing. The attorney, upon being advised of this regulation, filed the notice of appeal, and a notice of docketing was issued by this Board on February 16, 1972.

Note is taken of the examiner's failure to conform to the basic precepts of the Administrative Procedure Act, 5 U.S.C. sec. 557 (1970) wherein specific findings of fact are to be made and conclusions of law are to be reached. Without discussion of the facts supporting such findings, and without a statement of the law upon which the conclusions are based, it is not possible for this Board to determine how the decision is reached. *Estate of Lucille Mathilda Callous Leg Ireland*, 1 IBIA 67, 78 I.D. 66 (1971); *Estate of Oscar Ough, Sr.*, 1 IBIA 76, 78 I.D. 105 (1971).

It does appear, however, in the two decisions entered by the examiner, that he considers "records" of the family relationship to be of greater substance than oral testimony. However, this case record does not include any record of the Bureau of Indian Affairs tendered or admitted in evidence which would substantiate the claim of relationship made by Hattie Condon Marquez and Alfred McCoy. No such specific record is identified by the examiner as is required by 5 U.S.C. sec. 556(e) (1970). See *Estate of Julius Benter*, 1 IBIA 24

(November 17, 1970). A party is denied his opportunity to rebut material which is unavailable to him because it cannot be found.

Further, the examiner misconceives the exception to the hearsay rule of evidence as it pertains to family history, relationship and pedigree. In 29 Am. Jur. 2d Evidence (sections 508, 509 and 515, it is stated:

In section 508:

A well-recognized exception to the hearsay rule exists in respect of proof of matters of family history, relationship, and pedigree, and, subject to certain limitations and restrictions hereinafter noted, hearsay evidence is admissible to prove such matters. * * *

In section 509:

Since one point in favor of receiving hearsay evidence upon matters of family history or pedigree is its reliability, it has frequently been put forth as a condition upon which such evidence is received that it emanate from a source within the family. * * *

In section 515:

While it is generally held that a *declarant* as to matters of pedigree or relationship must have been a member of the family or, according to some authorities, a person closely associated therewith, there is no such requirement regarding a *witness* on the stand who merely repeats the declarations. Moreover, a witness on the stand who is in a position to know the facts as to pedigree can testify to those facts even if not a member of the family, since this is not hearsay, but personal knowledge evidence. *A fortiori*, a witness can testify as to his own pedigree.

Where pedigree is sought to be established by evidence of common or general reputation in the neighborhood, it is a matter of some dispute whether a witness

testifying thereto need be a member of the family in question.

The examiner discounted as hearsay and disregarded the uncontroverted testimony presented by the appellants. At the rehearing the appellees did not attempt to contradict the testimony presented by the appellants, which corroborated the testimony of the appellants offered at the original hearing. It should be noted here that the examiner's decision does not appear to be based upon his particular observation or evaluation of the witnesses of the contending parties or an evaluation of the statements there made. He made no finding regarding the credibility of the witnesses. Therefore, the basic rule, that where there is conflicting testimony the findings of fact of the examiner will not be disturbed on appeal, is not applicable to this appeal. See *Estate of Jackson Searle*, IA-S-2 (December 9, 1968).

The attorney for respondents, Alfred McCoy and Hattie Condon Marquez, in his brief on appeal stated, "Under the rules of appeal the finding of the examiner should not be reversed unless clearly erroneous." We point out that this statement by counsel displays a common misunderstanding of a fundamental distinction between administrative appellate rules and judicial appellate rules with respect to the weight to be given examiners' decisions by reviewing authorities. The "clearly erroneous" rule pertains to Rule 52(a) of the Federal Rules of Civil Procedure, and is ap-

(SAM E. HILL)

September 15, 1972

plicable by the courts, but not by administrative appellate tribunals. Kenneth Culp Davis, in his treatise entitled, *Administrative Law Treatise*, Section 10.04, summarizes the case law as follows:

The final distillation from the case law is that the primary fact-finder is the agency, not the examiner; that the agency retains "the power of ruling on facts * * * in the first instance"; that the agency still has "all the powers which it would have in making the initial decision"; that the examiner is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between examiner and agency is not the same as or even closely similar to the relation between agency and reviewing court; that the examiner's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses; and that the examiner's findings probably have greater weight than they did before adoption of the APA.

The leading case on this question is *National Labor Relations Board v. Universal Camera Corp.*, 190 F. 2d 429 (2d Cir. 1951) wherein Judge Frank in the opinion stated at 432:

* * * An examiner's finding binds the Board only to the extent that it is a "testimonial inference", or "primary inference," i.e., an inference that a fact to which a witness orally testified is an actual fact because that witness so testified and because observation of the witness induces a belief in that testimony. The Board, however, is not bound by the examiner's "secondary inferences," or "derivative inferences," i.e., facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed.

Although this matter has been in litigation since the decedent's death on February 2, 1967, we hold that a further hearing is necessary to prevent manifest injustice. We suggest, however, that the examiner schedule and hold such rehearing as expeditiously as possible, giving due consideration to the convenience of parties and witnesses.

The record indicates that some or all of the children and heirs of Narcisse Jim or Bone, father of the appellants, may be of Canadian nationality to whom fee patents will be issued in the event that it is ultimately determined that they are in fact heirs of the decedent. This matter of nationality should be fully investigated at the rehearing to prevent the need for further rehearing at a later date.

We note that the authenticity and reliability of the purported record of the proceedings before the Enrollment Committee, tendered as an appendix to the petition for rehearing, has not been established. This record is not yet in evidence and it must be fully tested and admitted in evidence before it can be considered at all. This rule also applies to all other records relied upon by the examiner, including those heretofore referred to by him in his orders.

ORDER

Now, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, 35 F.R. 12081, 43 CFR 4.296 it is hereby ordered:

1. That the examiner's decision is VACATED; and

2. That this matter is REMANDED for a further hearing after due notice given to the parties pursuant to 43 CFR 4.211 with special instructions that the examiner, among other things, make specific findings of fact regarding the nationality of the appellants as heirs or children of Narcisse Jim or Bone, and that he issue a new decision based upon all the evidence in the record including that newly adduced at the supplemental hearing; such decision to be final for the Department unless an appeal is taken therefrom; and

3. That this order is effective immediately.

DAVID J. McKEE, *Chairman.*

I CONCUR:

DAVID DOANE, *Alternate Member.*

UNITED STATES

v.

GLEN S. GUNN, ET AL.

7 IBLA 237

Decided September 15, 1972

Appeal from Office of Appeals and Hearings, Bureau of Land Management, affirming hearing examiner decision declaring mining claims null and void.

Affirmed as corrected.

Administrative Procedure: Generally—Mining Claims: Discovery: Marketability

The marketability test, as developed by

this Department and approved by the courts, is a complement to the prudent man test of discovery of a valuable mineral deposit under the mining laws, and publication of the test in the *Federal Register* is not a prerequisite to its validity.

Administrative Procedure: Generally—Constitutional Law—Mining Claims: Discovery: Marketability

The marketability test of discovery of a valuable mineral deposit under the mining laws does not violate due process of law as being unconstitutionally vague, or as being unlawful administrative legislation.

Administrative Procedure: Generally—Constitutional Law—Mining Claims: Contests—Rules of Practice: Government Contests

A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some prehearing newspaper publicity that the contest was being instituted but the claimant does not show that there was any unfairness in the contest proceeding itself.

Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Generally—Rules of Practice: Evidence

A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's *prima facie* case of no discovery with a preponderance of the evidence.

Mining Claims: Generally—Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Generally

Common clays are not locatable under the mining laws. Only deposits of clay of an exceptional nature which can be marketed for uses for which ordinary clays

cannot be used are subject to such location.

Mining Claims: Generally—Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Generally

A mining claim for a type of bentonite clay, which has not been adequately shown to be of a quality and quantity which can be marketed profitably for commercial purposes for which common clays cannot be used, is not valid.

Administrative Procedure: Decisions—Mining Claims: Contests—Rules of Practice: Appeals: Generally

A statement made in a Bureau appeal decision which does not accurately reflect one evidentiary fact does not establish that the decision's other findings were erroneous, and this Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that conclusion.

Mining Claims: Discovery: Generally

Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

Mining Claims: Discovery: Marketability

The marketability test of discovery is not satisfied by speculation that there might be a market at some future date.

Administrative Procedure: Decisions—Administrative Procedure: Hearings—Mining Claims: Hearings—Rules of Practice: Appeals: Hearings

Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after an initial decision in a mining contest may not be considered or re-

lied upon in making a final decision, but may only be considered to determine if there should be a further hearing.

APPEARANCES: George W. Nilsson, Monta W. Shirley, attorneys for contestees-appellants. George H. Wheatley, Office of the Regional Solicitor, California, for the United States, contestant.

*OPINION BY
MRS. THOMPSON*

**INTERIOR BOARD OF LAND
APPEALS**

This appeal in behalf of Glen S. Gunn, Julia D. Gunn, Hester L. Hamman Strahan, and Patricia Lee Kaer and Helen J. Brind, as heirs of Jobe L. Hamman, deceased, contestees, is from that part of a decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated February 13, 1970, affirming a hearing examiner's decision of May 28, 1969, declaring the Valley View Nos. 1 and 2 placer mining claims to be null and void. These claims are situated in section 22, T. 10 N., R. 2 E., S.B.M., in San Bernardino County, California.

The Government instituted the contest against these claims and six other claims by a complaint dated June 17, 1968, which was amended August 2, 1968, charging that: "Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." As to any other proceedings involving the lands, the amended complaint indicated that a

permit dated May 1, 1968, had been granted to the San Bernardino County Museum pursuant to the Antiquities Act of June 8, 1906, 16 U.S.C. secs. 432, 433 (1970). It also indicated the lands embraced in the Valley View Nos. 1 and 2, Venus, North Star, G & H, and a portion of the lands within the Ann placer mining claims are included in a notice of proposed classification for multiple-use management. This classification, made pursuant to the Classification and Multiple-Use Act of September 19, 1964, 43 U.S.C. secs. 1411-1418 (1970), was to preserve the archaeological values in the lands and to segregate them from mining activity.

Basically, the hearing examiner found, and the Bureau affirmed that finding, that there was not a discovery of a valuable mineral deposit within the Valley View Nos. 1 and 2 mining claims. The appeal is concerned with the correctness of that determination. Before considering the issues raised by appellants, however, one point must be clarified. Appellants state in their appeal that the Bureau "confirmed" the examiner's decision concerning the Valley View Nos. 1 and 2 claims, but that it "reversed as to other claims." Actually, the Bureau set aside the examiner's decision only as to a finding by the examiner that parts of the Hester, Michael, Ann and Venus claims lying within 15 feet of each side and parallel to a certain road were abandoned. The Bureau's decision expressly affirmed the examiner's ruling that those parts of the

Valley View No. 2, Venus, North Star, and G & H mining claims embraced within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, T. 10 N., R. 2 E., are null and void *ab initio* as these lands were withdrawn from appropriation by Public Water Reserve No. 22 prior to the initiation of the claims, and have never been restored from the reserve. This determination as to the invalidity of the claims within the water reserve stands.

Many of the appellants' contentions were made to the Bureau and were adequately answered in the Bureau's decision which found them generally to be without merit. We sustain the Bureau's responses to those contentions. In this appeal, appellants emphasize several arguments concerning the legal standards employed in the decisions below. They argue that the prudent man rule of *Castle v. Womble*, 19 L.D. 455, 457 (1894), was not appropriately followed here because the decisions indicated "marketability at a profit" was an inherent part of the prudent man test, which they dispute. They contend further that if the "marketability at a profit" test changes the prudent man test, it must be published in the *Federal Register*, and "since it has not been so published it is illegal and ineffective."

The marketability test has long been followed by this Department. See *e.g.*, *Layman, et al. v. Ellis*, 52 L.D. 714 (1929). The application of the test was expressly upheld in *Foster v. Seaton*, 271 F.2d 836 (D.C.

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Cir. 1959). It was further approved by the Supreme Court as a complement to the prudent man test in *United States v. Coleman, et al.*, 390 U.S. 599, 602 (1968), pointing out that "profitability is an important consideration in applying the prudent-man test." See also, *Converse v. Udall*, 399 F.2d 616, 621 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969), indicating that the marketability test is applicable to all mining claims including those containing precious metals, as previous court interpretations of the mining law and prudent man test were concerned with minerals "valuable in an economic sense." *Id.* at 622.

Since the marketability test has long been applied as a recognized standard before the *Federal Register* was established and is not a new substantive rule or statement of policy, there is no merit, in any event, to any argument that it must be published in the *Federal Register* to be effective. *United States v. E. A. Barrows and Esther Barrows*, 76 I.D. 299, 305 (1969), *aff'd sub nom.*, *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971). Departmental decisions which cite the test are made available to the public in accordance with the Administrative Procedure Act, 5 U.S.C. sec. 552 (1970). *Foster v. Jensen*, 296 F. Supp. 1348 (D.C. Cal. 1966).

Furthermore, appellants' contention that the marketability test is unconstitutionally vague has no merit. The court decisions cited above belie this contention.

Appellants contend generally that the decisions below violate due process in several respects. First, they contend that they unlawfully attempt to legislate in that they amend the mining laws by prescribing additional requirements to constitute discovery. There is no merit to this contention. Appellants recognize the prudent man test of discovery in *Castle v. Womble, supra*, despite the lack of express statutory language employing the test. The necessity for administrative and judicial declarations of what constitutes a valid discovery because of the lack of explanatory statutory language has long been recognized. See, e.g., *Chrisman v. Miller*, 197 U.S. 313, 321 (1905). Congress in its many deliberations concerning the mining laws has never seen fit to prescribe a different standard.

Appellants allege further they were denied due process because the contest was filed for the benefit of private persons and because of certain publicity concerning the contest proceeding before the matter was decided by the hearing examiner. They imply that because of this the examiner's determination could not be fair. We first point out that the United States may institute contest proceedings against mining claims simply to clear its title to the land without establishing any need or public project use for the land. *Davis, et al. v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964). *Cf. Palmer v. Dredge Corporation*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393

U.S. 1066 (1969); and *Dredge Corporation v. Penny*, 362 F.2d 889 (9th Cir. 1966), where the land within mining claims contested by the Government was valuable for homesites and being sought for such by individuals. Therefore, it was proper for the Government to institute this contest proceeding, in any event, regardless of the interest of the local governmental agency interested in performing archaeological work within the claims. The fact a permit has been granted to the museum does not constitute a denial of due process to claimants. They were granted a hearing and full opportunity to present their case.

Appellants contend that there was nationwide publicity instituted by the Secretary of the Interior beginning in July 1968, concerning the contest proceedings and the archaeological site. They submitted as Exhibit A at the hearing a copy of a newspaper clipping of June 22, 1968, captioned "Dig Site Mining Claims Ruled Invalid." The article itself, however, reported that the claimants had the right to a hearing if they answered the "notice" (contest complaint) served upon them. Despite appellants' general allegations of lack of due process because of the prehearing publicity, they have shown no unfairness in the contest proceeding itself. The fact that the hearing examiner was an employee of the Department of the Interior does not by itself show that the contest proceeding was lacking in fairness fundamental to due process, as appellants imply. *Cf. Converse v. Udall*, 262 F. Supp. 583

(D.C. Ore. 1966), *aff'd*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). We see no denial of due process in these proceedings.

Appellants further contend, in effect, that the Government has the burden of proof as the proponent of a rule or order under the Administrative Procedure Act, 5 U.S.C. sec. 556(d) (1970), and the hearing examiner erred in ruling that the Government need only establish a *prima facie* case. *Foster v. Seaton*, *supra*, makes it clear that the true proponent is the mining contestee who alleges a valid discovery, and when the Government has presented a *prima facie* case, the claimant has the burden to prove with a preponderance of the evidence that there has been such a discovery.

The significant issues in this case are whether there was a *prima facie* case established by the Government and whether the claimants met their burden of proof to establish a discovery of a valuable mineral deposit within the meaning of the mining laws.

Appellants' present appeal is concerned primarily with the principal material alleged to constitute a valuable mineral deposit within the claims, a type of bentonite clay. The Bureau held that the claimants failed to establish that the type of clay exposed on the claims is other than a common clay not locatable under the mining laws, and further it found that there was no evidence of a market for the clay, but only a hope that a market could be developed in the indefinite future.

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Appellants contend that bentonite is not a "common variety" of mineral, and quote the regulation defining "common varieties" under section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. sec. 611 (1970), which is now set forth at 43 CFR 3711.1(b). Although the decisions below found that the deposit was a common clay, they did not rule that the clay was no longer locatable under the mining laws because of section 3 of that Act which provided that a deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders, shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give validity to any claim located after the Act. Rather, they relied on the ruling in *United States v. Mary A. Mattey*, 67 I.D. 63 (1960), and cases cited therein¹ that common clays have never been locatable under the mining laws, instead only a deposit of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used may be located. Common varieties of clay are included in the category of material disposable by the United States under the Materials Act of July 31, 1947, 30 U.S.C. sec. 601 (1970). Appellant seems to be confusing common varieties under section 3 of the Surface Resources Act with the ruling reached below which found the deposit to be a common clay. Although many of the criteria

in determining what constitutes a common variety under section 3 of the Act of July 23, 1955, as set forth in regulation 43 CFR 3711.1(b), are also applicable in determining whether a clay is locatable generally, the basis for the determination should not be confused.

Appellants cite definitions and discussions of bentonite generally in various texts to support their contention that it is a special clay because it has been classified as such. The fact that bentonite clay has been given a special name, as appellants contend, is not determinative. The evidence in this case did not cover all types of bentonite, but was limited to the clay found on these claims. There is no factual basis in this case to make any general ruling concerning the locatability of all types of bentonitic clays. Our inquiry is limited to the clay deposit within these claims;

In reviewing the evidence in the record we agree with the decisions below that a *prima facie* case was established by the Government through the testimony of an expert witness who had examined the claims. He had tests performed on the clay found on the two claims and the tests showed that the clay did not meet commercial standards for certain uses for which some bentonite clays are suitable, such as for a bleaching clay for decolorization of crude oils (Tr. 33); or as a rotary drilling mud (Tr. 34-37). See also Tr. 44-46. He testified there were no valuable minerals found within the claims (Tr. 40).

¹ See also *United States v. Nogueira, et al.*, 403 F.2d 816 (9th Cir. 1968), involving the same claim as that in the *Mattey* case.

The contestees did not present any evidence of tests to show that the clay could be suitable for uses for which common clays could not be used. At most, contestees' expert witness testified that the clay was a unique bentonite containing hectorite "in addition perhaps to montmorillonite" (Tr. 89). He testified that hectorite has been used to keep beer from going rancid (Tr. 90). However, there was no evidence that this clay deposit could be marketed for such a purpose. Instead, he recommended that this clay could be used for pelletizing iron ores and that there was a possible market in Riverside County at the Kaiser Steel Plant (Tr. 90). Although he said he had made no tests of the bentonite on the claims, he stated he had tried it for pelletizing iron (Tr. 92). Pellets submitted as an exhibit (Contestees' Exhibit E), however, did not come from these claims (Tr. 96, 97). He testified there are no specific specifications for the clay to be used for pelletizing iron, "it is mostly by trial and error" and "has to be capable of agglomerating the particles" (Tr. 102). This testimony and his testimony that bentonite from these claims might be more competitive because of lower freight rates than that currently being used by Kaiser and that there might be more prospective purchasers of the material (Tr. 90, 91), was the most favorable evidence concerning this clay.

Most of his testimony, however, is actually more in the nature of advice for future work to be done on

the claims and for investigating market possibilities. There is insufficient evidence that there is clay of a quality that can be marketed profitably for commercial purposes for which common clays cannot be sold. There is little concerning the quantity of clay within the claim that may be based on more than inference. Other than the discussion concerning freight costs, there is no evidence concerning the economic realities of a mining operation within the claims, such as evidence concerning possible prices for which the clay could be sold and possible costs of a mining operation. Without an adequate showing that the clay is of a quality and quantity which can be marketed profitably for commercial purposes for which common clay cannot be sold, the claim is not a valid claim based on the clay alone. *United States v. Mary A. Matthey, supra.*

As to other mineral values within the claims, contestees tried to show values of gold and silver and there was testimony concerning agates and opals which might have a horticultural decorative use. None of the evidence was sufficient to show that there was a discovery of a valuable mineral deposit. We agree with one contention of appellant that the decision below should not have relied on a statement by the contestees' expert witness analyzing an assay for the metal values at two cents a yard. This statement, at Tr. 106, that "Mr. Gunn has an assay that goes to two cents a yard" followed a discussion concerning the fire as-

say method. The assay submitted in evidence by the contestees showed a combined value of gold and silver of \$4.79 (Tr. 60, 61, 106). This was by the fire assay method, however. It is apparent from the evidence that values shown by the fire assay method cannot be relied upon to establish the recoverable mineral values of an actual mining operation (see Tr. 104, 105). It is not clear whether the reference to the two-cent assay by the witness was to a different type of assay or, as appellants contend, that there was a typographical error in the transcript. The misconception by the Bureau of that one fact does not establish that the decision's other findings were erroneous. This Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that ultimate conclusion.

In short, from our review of the entire record, there is little evidence to show that the claims were at anything more than the beginning of exploration work, and nothing to show that a valuable mine could be developed under the facts then known. Persuasive evidence of a valuable mineral deposit would prove minerals of a quality and quantity from which expected market price estimations might be made which could be compared with possible costs of the mining and marketing operation to establish whether a prudent man could expect to develop a valuable mine. See *Adams v. United States*, 318 F.2d 861, 870 (9th Cir. 1963).

At most, the contestees' evidence showed that they might be warranted in doing further exploratory work for the clay and the metals, and in doing further work to find a market for the clay. This, however, is not sufficient. Under the mining laws, a contestee must show more than evidence of mineralization which might warrant further exploration work within a claim; instead, the evidence shown must be sufficient to warrant a prudent man to go forward with development work of a mine. See *Converse v. Udall*, *supra*. Speculation that there might be a market at some future date does not satisfy the marketability test. *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971). See also as to a clay deposit allegedly useful for certain industrial purposes, *United States v. John B. Kathe, Jr.*, A-27744 (November 19, 1958).

Appellants have submitted an affidavit of Glenn S. Gunn, making certain assertions concerning his assessment work on the claims in 1969 and 1970, and of his belief that the bentonite is of the highest grade. Under the Administrative Procedure Act, 5 U.S.C. secs. 556, 557 (1970), the record made at the hearing constitutes the exclusive record for decision except to the extent that official notice of facts may be taken. Further evidence presented on appeals after initial decisions have been rendered following a hearing may not be considered or relied upon in making a final decision. Such a tender of evidence may be considered only to de-

termine if there should be a further hearing. *United States v. Arch Little and Ethelyn Little*, A-30842 (February 21, 1968).

Although additional evidentiary data has been filed with the appeal, appellants have not requested a further hearing, nor do we see any basis for any further hearing in this case. The lands have been segregated from mining since the proposed classification in 1968, therefore, evidence as to work performed since that time to try to establish the existence of a mineral deposit, if there were any basis for permitting reopening the hearing which there is not, would not be of significance to the question which has been decided that there was not a valid discovery as of the time the lands were segregated from appropriation under the mining laws. *See Udall v. Snyder*, 405 F.2d 1179 (10th Cir. 1968), *cert. denied*, 396 U.S. 819 (1969).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as corrected above.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

MARTIN RITVO, *Member*.

TIPPERARY LAND & EXPLORATION CORPORATION

7 IBLA 270

Decided September 19, 1972

Appeal from Bureau of Land Management decision rejecting high bid for oil and gas lease on Outer Continental Shelf Land, OCS-G 2020.

Reversed.

Administrative Practice—Words and Phrases

"*Competitive Bidding*." Competitive bidding does not require that more than one bid be submitted before the authorized officer, but only that the officer, by due advertisement, give opportunity for everyone to bid.

Contracts: Formation and Validity: Bid Award—Outer Continental Shelf Lands Act: Oil and Gas Leases

The competitive bidding requirement in the Outer Continental Shelf Lands Act for awarding oil and gas or sulfur leases is satisfied by due advertisement and a giving of an opportunity to bid, and contemplates that all bidders be placed upon the same plane of equality, and that they each bid upon the same terms and conditions set forth in the advertisements, and the pertinent statutes and in the Department's regulations. Competitive bidding does not require that more than one bid be submitted before the authorized officer, but only that the officer, by due advertisement, give opportunity for everyone to bid.

September 19, 1972

Oil and Gas Leases: Competitive Leases—Outer Continental Shelf Lands Act: Oil and Gas Leases

A decision rejecting a bid for an Outer Continental Shelf Lands Act oil and gas lease will be set aside where the bid met two of three criteria used by the manager to evaluate bids, and the third one was improperly imposed.

APPEARANCES: Arlen Edgar, Vice President, Tipperary Land and Exploration Corporation.

OPINION BY MR. HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Tipperary Land & Exploration Corporation has appealed from rejection of its bid for tract 2138, E ½ Block 143, East Cameron area, Louisiana, OCS-G 2030, offered December 15, 1970, at an oil and gas lease sale pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. sec. 1337 (1970). The decision by the Manager, Outer Continental Shelf Office, BLM, stated:

The notice of this sale published in the Federal Register Vol. 35, No. 205, Pages 16417-16419 inclusive, contained a statement that "The United States reserves the right and discretion to reject any all bids, regardless of the amount offered."

In accordance with this specific reservation the bid referred to above is hereby rejected for inadequacy of the cash bonus bid.

The appellant contends essentially that lack of geological infor-

mation relating to the subject tract precludes any way of knowing if its bid is adequate or inadequate, and that rejection of the high bid is contrary to the Outer Continental Shelf Lands Act.

The record shows that the tract 2138, was considered to be part of a single prospect consisting of tracts 2137, 2138, and 2139. These tracts, as a group, are about 40 miles from shore, under a water depth of approximately 80 feet, and 6 miles north from the closest existing pipeline. Only one of these tracts, tract 2137, had ever been leased for oil and gas under the Act. It was offered for sale in 1955. A lease issued in response to a high bid of \$16.10 per acre expired August 31, 1960. No production of oil or gas was obtained under the lease. Several other tracts in blocks 129, 130, 148, and 149, adjacent on the north and south sides of tract 2137 were leased in response to the 1955 sale, and all the leases expired without any production of oil or gas being obtained.

Prior to the sale of December 15, 1970, the Government determined the risk value, and the risk-free value of tract 2138, as well as of the neighboring tracts 2137 and 2139, to be nominal only.¹

¹ "Nominal" is defined in Webster's Third New International Dictionary (1966), as "Being so small, slight, or negligible as scarcely to be entitled to the name: trifling, insignificant."

At the sale, the sealed bid of \$45,-075 (\$18.03 per acre) of the appellant was the only bid submitted for tract 2138. The adjacent tracts each received three bids, with high bids of \$84.86 per acre for tract 2137, and \$38.36 per acre for tract 2139. Each of these high bids was accepted.

Before the sale the Geological Survey had characterized tract 2138 and the adjacent tracts 2137 and 2139 as being wildcat acreage located on a structural feature which has not previously produced oil or gas, but which is in close proximity to other producing structures. Projection of these nearby reservoirs and sand conditions into the leasing tract is possible through the use of geophysics, stratigraphy, and paleontology. It is also possible to obtain a reserve estimate based on reserve calculations performed in a nearby comparable producing structure. After the sale, the Geological Survey made no recommendation that the high bid for tract 2138 be rejected.

The manager stated that he rejected high bids tendered at the sale which failed to meet two of these three tests: 1) one hundred percent of the pre-sale evaluation, 2) fifty percent of the risk-free value, 3) the high bid exceeded at least five other bids for the same tract. The manager has reported that both the pre-sale evaluation and the risk-free value were "nominal." Applying the accepted definition of this term, it is obvious that the high bid of Tipperary exceeded both the pre-sale evaluation and the risk-free value.

Looking at the third test applied by the manager, that the bid exceeded at least 5 other bids for the tract, we note in his "Bid Adequacy Determination Data," the following comments relative to tract 2138:

No competition on tract.

Very poor bidding pattern of higher bidder in this sale.

High bid less than $\frac{1}{4}$ that was offered for adjacent tracts at this sale.

Below historical prices in this area.

Within the Outer Continental Shelf Lands Act requirement for "competitive bidding" in awarding oil and gas or sulfur leases, we construe the quoted term as requiring due advertisement, the giving of an opportunity to bid and that all bidders be placed upon the same plane of equality, that they each bid upon the same terms and conditions involved in the advertisement, including the pertinent statutes and the regulations, and that the advertisements specify as to all bids the same specifications. Competitive bidding does not require that more than one bid be submitted before the authorized officer, but only that the officer, by due advertisement, give opportunity for everyone to bid. See *Wilmington Parking Authority v. Ranken*, 105 A. 2d 614 (Del. 1954).

Notice of the subject sale was published in the *Federal Register*, Volume 35, pages 16417-16419, on October 21, 1970. The test requirement of at least six bids per tract is not compatible with our definition of "competitive bidding."

The sale notice carried a caveat that the United States reserves the right and discretion to reject any

and all bids, regardless of the amount offered. This board has affirmed the action of a manager to reject high bids for reason of inadequacy where the same parameters were applied to all high bids rejected. See *Kerr McGee Corporation, et al.*, 6 IBLA 108 (June 5, 1972); *Humble Oil and Refining Company*, 4 IBLA 72 (November 8, 1971).

From our review of the records and documents used by the manager in arriving at his decision relative to tract 2138, it is evident that he did not adhere to the same conditions in determining that the high bid of Tipperary was inadequate in amount, as he professed to have applied to all high bids rejected by him, to wit: a high bid would not be rejected unless it did not satisfy two of three conditions that are (1) meet 100 percent of pre-sale evaluation (2) 50 percent of the risk-free value, or (3) exceed at least five bidders for the tract. As the bid of Tipperary did meet two of these three tests (and we have shown that the third test was improper), it must be held that the rejection of the high bid of Tipperary for tract 2138 was improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the manager is reversed, and the case is remanded to the Bureau of Land

Management for further appropriate action, not inconsistent herewith.

DOUGLAS E. HENRIQUES, *Member*.

WE CONCUR:

MARTIN RITVO, *Member*.

EDWARD W. STUEBING, *Member*.

FOSTER MINING AND ENGINEERING COMPANY

7 IBLA 299

Decided September 22, 1972

Appeal from decision of Riverside, California, district and land office, Bureau of Land Management, declaring lode mining claims void *ab initio* in part.

Affirmed.

Mining Claims: Generally—Rules of Practice: Appeals: Standing to Appeal

A transferee of a mining claim declared void *ab initio* by a decision of the Bureau of Land Management has standing to appear before the Board of Land Appeals in an appeal proceeding from that decision.

Administrative Procedure: Hearings—Mining Claims: Hearings—Rules of Practice: Hearings

In a Departmental proceeding to determine the validity of a mining claim, an evidentiary hearing under the Administrative Procedure Act is required only if there is a disputed determinative question of fact; where the validity of a claim

turns on the legal effect to be given to facts of record determining the status of the land when the claim was located no hearing is required.

Mining Claims: Hearings—Mining Claims: Lands Subject to—Mining Claims Rights Restoration Act—Rules of Practice: Hearings—Withdrawals and Reservations: Power Sites

Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ad initio* without a hearing.

Mining Claims: Lands Subject to—Mining Claims Rights Restoration Act—Notice—Public Records

Notice on Public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws.

Federal Employees and Officers: Authority to Bind Government—Mining Claims: Lands Subject to—Notice

A failure of Government officials to provide information that land was closed to mining locations cannot give life to invalid mining claims.

APPEARANCES: William B. Jacobs, President, Foster Mining and Engineering Company; Monta W. Shirley, Attorney for Ramsher Mining and Engineering Corporation; Evelle J. Younger, Attorney General, Sanford N. Gruskin, Chief Assistant Attorney General, and Edwin J. Dubiel, Deputy Attorney General, Attorneys for the State of California.

**OPINION BY
MRS. THOMPSON**

**INTERIOR BOARD OF LAND
APPEALS**

This appeal by the Foster Mining and Engineering Corporation (hereafter referred to as Foster) is from a June 11, 1970, decision by the Riverside, California, district and land office, Bureau of Land Management, declaring its ten lone mining claims, the Summit Alpha Nos. 30-33, 42-46, and 64, to be void *ab initio* as to those portions of the claims lying within section 9 and the W $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, section 10, T. 2 N., R. 4 W., S.B.M., California. The decision found the lands were withdrawn under section 24 of the Federal Power Act, 16 U.S.C. sec. 818 (1970), when the claims were located on September 10, 1965, and were not opened to mineral entry under the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. sec. 621 (1970), because they are excepted under the third proviso of the Act, being within a preliminary permit (Project No. 2426, the California Aqueduct Project) issued by the Federal Power Commission to the Department of Water Resources of the State of California, effective July 1, 1964. The decision also noted that the permittee had filed an application to license the project with the Federal Power Commission on December 15, 1965.

By order of this Board the State of California was designated an

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adverse party and afforded an opportunity to answer Foster's appeal. A reply to the State's answer was filed by Ramsher Mining and Engineering Corporation (hereafter referred to as Ramsher). The State filed a motion to strike the reply on the ground there was no showing that Ramsher is a party in the matter and has standing to appear in this appeal proceeding. In response to this motion and also to a letter from this Board requesting the basis for Ramsher's appearance, Ramsher filed a copy of a deed from Foster to Ramsher executed February 22, 1971, and recorded March 10, 1971, conveying certain unpatented mining claims, including those in question. In view of this showing that Ramsher has an asserted interest in the mining claims in question, it has standing to enter its appearance as a party in this appeal proceeding. Therefore, the State's motion to strike Ramsher's reply is denied.

Foster generally alleges that it located the claims in good faith, there was no record the land was withdrawn, and it has paid county taxes and has performed assessment work on the claims for five years without any notice to it of any adverse claims. It states that "the facts in this case do not make the decision of *The Dredge Corporation*, 64 I.D. 368 (1957) applicable and claim that a hearing should have been held in this matter and that since no hearing was held, this decision is in itself null and void." It re-

quests a hearing.¹ Other than the general statement quoted above, the only other reason offered for a hearing is its statement that

* * * interoffice communications or preliminary permits or applications for license not made official or a part of the public record are not sufficient to void their legal right to said mining claims.

Ramsher also contends, in effect, that the claims may not be declared void without a hearing. It contends that if a hearing had been afforded it could have shown that the State's preliminary permit was issued subject to conditions which were never fulfilled and, therefore, the permit had expired. It contends there was a lack of due process in not affording the mining claimant opportunity for a hearing, and also that there was no notice of the permit on file with the land office at the time the claims were located.

The primary issue raised by Foster and Ramsher is whether a hearing is necessary to fulfill the requisites of due process before these claims may properly be declared invalid. In the *Dredge* case cited by appellants and in the decision below, it was stated, at 64 I.D. 375:

Here the appellant could have acquired no right in the land because it was under lease to third parties, segregated from the public domain, and not open to loca-

¹ Foster also contended that regulations quoted in the decision do not apply. The only regulations referred to in the decision were those pertaining to its right of appeal from that decision.

tion. It is well settled that a locator does not acquire any property right by virtue of his location if the location is made on land not subject to appropriation. See *El Paso Brick Co. v. McKnight*, 233 U.S. 250 (1914); *Brown v. Gurney*, 201 U.S. 184 (1906), and *Gwillim v. Donnellan*, 115 U.S. 45 (1885). * * *

This holding was affirmed in a supplemental decision in the same case at 65 I.D. 336 (1958). There the Department enunciated more fully the test used in determining when a hearing is available, to wit:

* * * The petitioner seems to be under the impression that the validity of any mining location must be tested at a hearing, meaning a hearing at which the parties may appear and present evidence. * * *

* * * Almost from time immemorial the Department has observed a clear distinction between cases where the validity of a mining claim turns on the legal effect to be given to facts of record (a question of law) and cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). *Id.*, at 338.

* * * * *

* * * In short, for well over 50 years and probably much earlier, the Department has followed two distinct procedures in determining the validity of mining claims, holding hearings in cases turning on questions of law. *Id.*, at 339.

Both of these decisions were affirmed in *Dredge Corporation v. Penny*, 362 F.2d 889 (9th Cir. 1966), where the court, at 890, indicated that when the mining claimant does not specify issues which require a hearing, there is no "prejudicial disregard of the hearing requirements of the Administrative Procedure Act" (5 U.S.C. sec. 551 *et seq.* (1970)).

Thus, appellant's contention that the *Dredge Corporation* cases do not apply in the instant case lacks merit, for the standards required for an evidentiary hearing under the Administrative Procedure Act in determining the validity of a mining claim are clearly established. Only if there is a disputed determinative question of fact does a claimant have the right to such a hearing. See also, *United States v. Consolidated Mines & Smelting Co., Ltd., et al.*, 455 F.2d 432, 453 (9th Cir. 1971).

The only issues which appellants specify to support their request for a hearing are the State's alleged noncompliance with the terms of the preliminary permit and the lack of notice of the State's preliminary permit on the land office records. Do these general allegations raise questions of fact which must be resolved by an evidentiary hearing under the Administrative Procedure Act? The answer must be no. The determinative issue in this case is whether the lands were open to entry under the mining laws (30 U.S.C. sec. 21 *et seq.* (1970)) when the claims were located. It is clear from the *Dredge* cases that where the validity of a mining claim turns on the legal effect to be given to facts of record establishing the status of the land when the claim was located no hearing is required.

As to the alleged noncompliance of the State with the terms of the preliminary permit, Ramsher asserts that the State's permit had expired when the claims were filed

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because the State had failed to perform the conditions of the permit.

From information furnished by the State and the Federal Power Commission in this case record, it is apparent that the State filed its application for a preliminary permit with the Federal Power Commission on November 14, 1963, and the permit was granted by order of the Commission for a term of 36 months on July 16, 1964.

Section 5 of the Federal Power Act provides that preliminary permits "may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing." 16 U.S.C. sec. 798 (1970). It is a matter of public record shown on the official records of the Commission, of which we may take notice, that at the time the mining claims were located in 1965, the permit was in effect, and the permit was never canceled by the Commission. Ramsher's offer to tender evidence at a hearing in this Department as to alleged noncompliance by the State with the terms of its permit is simply specious at this late date as made to an agency which had no jurisdiction over the permit.

We come now to the question of the effect of the preliminary permit upon the status of the land and the question of notice. From the record before us, it does not appear that there was any notation on the land office records of the State's prelim-

inary permit at the time the mining claims were located in 1965. However, it appears that there was other public notice of the preliminary permit application. In Exhibit F of the permit application the federal lands involved in the proposed project are listed by legal description. Notice of the application describing the proposed project generally was published in the *Federal Register* (29 F.R. 368, January 15, 1964), and in local newspapers. Although those notices did not list the legal description of the federal lands affected thereby, they listed the counties where the lands were and also indicated that the application was available for public inspection in the offices of the Federal Power Commission.

The Commission found that the publication of the notices met the requirements for notice of the preliminary permit application specified in section 4(f) of the Federal Power Act, 16 U.S.C. sec. 797(f) (1970), which authorizes the Commission to grant such permits, as provided by section 5 of the Act, 16 U.S.C. sec. 798 (1970), for the "sole purpose of maintaining priority of application for a license * * *." On page two of its order of July 16, 1964, issuing the preliminary permit, the Commission stated:

(2) Public notice of the filing of the application has been given as required by the Act. No protests or petitions to intervene have been received. No conflicting application is before the Commission.

As to the effectiveness of the permit, there is no merit to any conten-

tion of insufficient notice of the application for the permit.

The effect of the filing of the application for a preliminary permit as to the status of public land included therein is the same as the filing of the application for a license for a proposed power project. It is provided by section 24 of the Federal Power Act, 16 U.S.C. sec. 818 (1970), that any lands of the United States included in any proposed project under the Act.

* * * shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [C]ommission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. * * *

It has been the practice of the Department when the Federal Power Commission has sent notice of the filing of an application for a preliminary permit or a license to the land office to note the land office public land status records to show a withdrawal of the land as of the date of the filing of the application with the Commission. See *Instructions*, 51 L.D. 613 (1926). The rules of the Commission provide that notice of preliminary permits will be given to the appropriate office of this Department as to the public lands affected "so that withdrawals from entry may be recorded." 18 CFR 4.81. Apparently in this case notice of the permit application and

of the license application was not sent to the land office and, therefore, no notation was made upon the land office records as of the time the claims were located. Although section 24 of the Federal Power Act quoted above provides that notice of applications "shall be filed in the local land office," it does not expressly require that notation of the application be made on the land office records nor is the effective date of the withdrawal or segregation the date notice of the application is filed in the land office. Instead, it expressly provides that "from the date of filing of application therefor" the lands are reserved "until otherwise directed by the [C]ommission or by Congress." The filing of the application is with the Commission and this Department has no authority to declare the lands open to location, entry, or selection unless the Federal Power Commission makes the determination that the lands should be opened or Congress so provides. *Nevada Irrigation District*, 52 L.D. 371, 376, *approved on rehearing*, 52 L.D. 377 (1928).

There is nothing in this case to indicate that the Commission determined these lands should be open to entry. This leads us to the Congressional enactment pertinent here, namely, the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. sec. 621 (1970), which declared public lands within powersite withdrawals to be open to location under the mining laws subject to a reservation of power rights to the United States. The third proviso of the first

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paragraph, however, governs here. It provides, in part:

* * * That nothing contained herein shall be construed to open for the purposes described in this section any lands * * * (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once.

Thus, Congress has provided that public lands within preliminary permits granted by the Federal Power Commission are not open to mining location. If mining claims are located when the lands are within a preliminary permit issued by the Commission, the claims are void *ab initio*. *A. L. Snyder, et al.*, 75 I.D. 33 (1968). Furthermore, the filing of an application for a license while the permit was in effect "kept the land 'under examination and survey by a prospective licensee of the Federal Power Commission' within the meaning [of the above quoted proviso] since it was filed before the permit expired and preserved the priority of the permittee under the permit." *Id.* at 36; *C. A. Anderson*, A-29999 (March 23, 1964); *Francis N. Dlouhy*, A-28597 (May 18, 1962).

Because appellants' claims were located when the land was within the preliminary permit they must be declared null and void *ad initio*. The fact that notice of the application for the permit, the permit,

and the application for a license was not made on the land office records of public land status, does not compel a contrary conclusion. Congress may provide for the appropriation or withdrawal of public lands as it sees fit "with or without notice, at least prior to the time that private rights had vested." *Lutzenhiser v. Udall*, 432 F.2d 328, 331 (9th Cir. 1970). No notice on the land office records has been prescribed here. No rights vested in the claimants where the lands were already appropriated under the preliminary permit. It is not essential that a permit be made a matter of record on the land office records at that time to have segregative effect under the law. *Cf. United States v. Schaub*, 103 F. Supp. 873, 875 (D. Alaska 1952), *aff'd*, *Schaub v. United States*, 207 F.2d 325 (9th Cir. 1953). We may note that lack of notice on the records of this Department of other appropriations of public lands under Congressional enactments is not fatal to their effectiveness where not expressly required by Congress. The most obvious example of such an appropriation would be a valid mining claim for lands open to location perfected under the mining law, yet the land office records will not reveal its existence.

Furthermore, any failure of Government officials to provide information that land was closed to mining cannot give life to invalid mining claims. *Leslie G. and Rita M. Folwell*, A-31104 (August 18,

1969). This principle is applicable here.²

Because our determination that the claims are invalid must be based on facts which may be officially noticed and there are no genuine factual disputes here as the determinative issues are resolved by legal conclusions reached above, appellants' request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

DOUGLAS E. HENRIQUES, *Member*.

EDWARD W. STUEBING, *Member*.

ANNA A. MADROS

7 IBLA 323

Decided September 26, 1972

Appeal from a determination of the Alaska State office, Bureau of Land Management, that the appellant's Alaska Native Allotment claim,

F-13723, is impressed with an oil and gas reservation in favor of the United States.

Appeal dismissed and case remanded.

Rules of Practice: Appeals: General—Rules of Practice: Appeals: Standing to Appeal

Appeals from Bureau of Land Management decisions, which are not dispositive of the ultimate issues, will not be considered. They are properly dismissed as premature unless permission to appeal is first obtained from the Board of Land Appeals upon a showing that an immediate appeal may materially advance the final decision.

APPEARANCES: Richard Frank, Esq., Tanana Chiefs Conference.

OPINION BY MR. FRISHBERG

INTERIOR BOARD OF LAND APPEALS

On March 29, 1971, the appellant filed application for an Alaskan Native Allotment pursuant to 43 U.S.C. sec. 270-1 (1970). She alleged settlement and occupancy of the two parcels applied for since September 6, 1946. The file fails to disclose that the Bureau took any action to determine the appellant's entitlement to an allotment. Nevertheless, on April 26, 1972, the Bureau's Alaska State Office rendered a decision advising her that the claim had been classified as valuable for oil and gas and would be impressed with a reservation to the United States for those minerals in accordance with 43 U.S.C. secs. 270-11, 270-12 (1970). She was afforded a 30-day period in which to dis-

² Although, as indicated above, the lack of notice of the preliminary permit application, permit, and license application, upon the land office records does not give life to these mining claims, we do not sanction the inadvertent failure to provide the public with this information. We urge the Bureau of Land Management to seek cooperation from the Federal Power Commission to assure that information from that Commission which will affect public land status will be timely furnished to the Bureau so that notation may be made on the public land status records for the public's information.

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prove the mineral classification or to appeal. Ms. Madros appealed.

The primary question before the Bureau of Land Management is the appellant's entitlement to an allotment. Only if an allotment is approved will it be necessary to inquire whether it should be subject to a mineral reservation in favor of the United States. Any consideration of a mineral reservation requirement prior to the determination of the primary question is premature. In such case the appeal is properly dismissed without prejudice. See 43 CFR 4.28; *United States v. The Dredge Corporation*, 76 I.D. 23 (1969); *Newell A. Johnson, et al.*, 70 I.D. 388 (1963). Although this regulation and the cited cases deal with interlocutory appeals from hearing examiners' rulings, the principle applies with equal force to non-final decisions of Bureau officials.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the appeal is dismissed. The case record is returned for appropriate processing of the allotment application. If the applicant is entitled to an allotment she will then be informed relative to the mineral classification of the land and afforded an opportunity to disprove it or appeal.

NEWTON FRISHBERG, *Chairman*.

WE CONCUR:

MARTIN RITVO, *Member*.

FREDERICK FISHMAN, *Member*.

APPEAL OF C.I.C. CONSTRUCTION

IBCA-941-11-71

Decided September 26, 1972

Appeal from Contract No. 53500-CT1-300, Equipment Rental for the Boise, Idaho District, Bureau of Land Management.

Denied in Part—Dismissed in Part.

Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Substantial Evidence—Rules of Practice: Appeals: Burden of Proof

The contracting officer's determination of the hours property chargeable to the Government under a rental of equipment contract will be sustained where the contractor asserts that the hours claimed are reflected in its record but fails to offer any evidence in support of the claims made.

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Failure to Appeal—Rules of Practice: Appeals: Dismissal

Where four claims are asserted affirmatively for the first time in a notice of appeal and where thereafter the contractor fails to appeal the subsequent decision of the contracting officer denying the claims so asserted, the contracting officer's decision is final and conclusive under the express language of the Disputes Clause thereby requiring the dismissal of the four claims for lack of jurisdiction.

APPEARANCES: For the appellant Leo P. Bergin, Attorney at Law, McDonald, Carano, Wilson & Bergin, Reno, Nevada; for the Government David E. Lofgren, Department Counsel, Portland, Oregon.

OPINION BY MR. McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The dispute with which we are primarily concerned in this appeal involves a disagreement between the parties as to the hours properly chargeable to the Government as rent for six motor graders used by the contractor¹ for road maintenance² in the Bureau of Land Management's Boise, Idaho District.

Under paragraph 26 of the special provisions (note 7, *infra*) of the contract, the hours the equipment was used were to be recorded on service recorders or "clocks" to be furnished by the Government and to be installed by the contractor.

The disparity between the hours claimed by the appellant in its notice of appeal and in its complaint, as contrasted with the hours of use contended for by the Government is shown in the following schedule:

Item	Per hour	Notice of appeal		Findings (Oct. 13, 1971)		Difference
		Hours	Amount	Hours	Amount	
1-----	\$15. 93	797¾	\$12, 708. 06	697¾	\$11, 115. 16	\$1, 592. 90
2-----	14. 87	568¾	8, 463. 60	510¾	7, 591. 14	872. 46
3-----	14. 87	883¾	13, 141. 36	827¾	12, 308. 64	832. 72
Total-----		1 2, 250	2 34, 313. 02	2, 036	31, 014. 94	3, 298. 08

¹ In the claim letter of August 16, 1971 (Exhibit 6), appellant's attorney stated:

"Mr. Culverwell paid a total of 2,252 hours to operators. Inasmuch as the Government violated the contract * * * it would seem to me they have assumed the risk of the inaccuracy and malfunction of the clocks, plus their failure to have the operators sign. Mr. Culverwell is willing to settle for 2,200 hours."

² Mathematical errors reflected in the appellant's calculations overstate the claim by \$9.90. This results from the extension figures for item 1 being understated by 10 cents and the extension figure for item 2 being overstated by \$10. Utilizing the correct figures the total amount claimed by the appellant as equipment rental for the three contract items is \$34,303.12 leaving an aggregate net difference between the amount claimed and the amount paid of \$3,288.18.

¹ The face page of the service contract (Standard Form 19, October 1969 Edition) is signed by C. I. Culverwell who is identified as the owner. Appeal File Exhibit 1. All references to exhibits are to those contained in the appeal file.

² In pertinent part the contract provision reads:

"11. GENERAL REQUIREMENTS AND WORK AREAS

The Boise, Idaho District of the Bureau of Land Management requires the service of the equipment, fully operated, as indicated on the Bid Schedule, for road maintenance work.

(Exhibit No. 1, Special Provisions for Equipment and Aircraft Rental Contracts, p. 2.)

Neither party having requested a hearing, the questions presented will be decided on the basis of the documents contained in the appeal file as supplemented by the information submitted in response to the settling of the record notice.³

Contract No. 53500-CT1-300 was awarded to C.I.C. Construction on

³ Order Settling Record, dated June 8, 1972, under which the parties were authorized to supplement the record by submitting additional documents by July 10, 1972.

April 12, 1971. Included as Special Provisions for Equipment And Aircraft Rental Contracts were Variations in Quantity⁴ and Rental Rate And Payment⁵ provisions. The notice to proceed was received by the contractor on April 14, 1971. The contract was determined to have been satisfactorily completed as of June 25, 1971 (Exhibit 10). The first evidence of a dispute is the notation written in long-hand on the Certificate For Contract Payment dated July 23, 1971 (Exhibit 3) and reading as follows:

There is a discrepancy between Govt. and contractor on the amount of hours to be paid so we have marked this as a partial.

⁴ "9. Variations in Quantity :

"The number of units of rental stated in the contract is only an estimate, and is not guaranteed to be actual. Payment will be made for actual units of operation as determined by the Bureau, at the rate specified. The contractor will have no claim against the Bureau solely because of variations from the estimated number of units. If the number of units varies by more than 25 percent from the estimate, the contracting officer may, if the circumstances warrant, proportionately change the period of the contract."

⁵ "26 RENTAL RATE AND PAYMENT

"The rental rate shall be based on the actual operating hours for each piece of equipment, including its operator, as established by a service recorder. Payment of the rental rate as bid shall constitute full compensation to the contractor for furnishing the required equipment, salaries and expenses of operating personnel, transportation to and from project site(s), all fuel, repairs and servicing required to keep rented equipment in good operating condition.

"The service recorders will be furnished by the Government and it shall be the responsibility of the contractor to mount them on the graders. Charts for these recorders shall be furnished by the Government. The contractor shall be responsible for the service recorder(s) until returned to the Government upon completion of the contract."

Thereafter, the Government acknowledged in the Certificate For Contract Payment dated August 9, 1971 (Exhibit 4) and in a letter dated August 13, 1971 (Exhibit 5), that the contractor was entitled to be paid a total of 2,036 hours as contrasted with the 1,965 hours shown in the earlier certificate (Exhibit 3).

According to the claim letter of August 16, 1971 (Exhibit 6), there were a number of items⁶ in regard to the work performed in the Boise District that were unsatisfactory⁷ to the appellant. In support of the claim presented the letter states:

After examination of the charts, it is apparent that the clocks did not work correctly at all times and were not kept in proper form. Paragraph 26⁸ of the con-

⁶ Concerning contract item No. 1 the appellant's attorney advanced the contention that the contractor had been shorted the difference between 697½ hours and 510½ hours at \$1.06 per hour (\$15.93 per hour for item No. 1 less \$14.87 per hour for items No. 2 and No. 3), or a total difference of \$198.22. In the findings of October 13, 1971 (Exhibit 9) the contracting officer acknowledged that the hours for item No. 1 should be increased from the 680 hours previously allowed (Exhibit 4) to the 697½ hours claimed. In the notice of appeal and in the complaint, however, the appellant claims 797½ hours for item No. 1. No explanation has been offered for the 100 hours increase except to say that "the true hours on that item, as reflected by the records of the contractor, are 797.75 hours." (Complaint, pp. 1, 2).

⁷ While not presented as a claim item until the filing of the notice of appeal, the letter states:

"Finally, this contract was for maintenance and not new construction. Normally Mr. Culverwell receives an additional \$10.00 an hour for new road construction due to the increased wear and tear on his machinery and would be entitled to it under one of the general provisions of the contract. However, after discussing this with Mr. Culverwell, it is his position that in hopes of getting this matter resolved expediently, he will not seek any increased charges in this matter."

⁸ Note 7, *supra*.

tract provides that the recorder and charts should have been furnished by the Government and mounted and maintained by the contractor. However, in this case, the clocks were installed and maintained by the Government and the inspector who installed the charts did not have the motor grader operators sign the charts or furnish the contractor copies of the charts during the course of the contract. It is apparent from examining the copies of the charts that we have been given that the clocks were either changed from grader to grader or that the inspector made a mistake on the numbering. For example, Grader No. 5 was listed as No. 3 on the charts sent to Mr. Culverwell. In the same group of charts there are some on which there is no equipment number. There also appears to be a gap in the numbering of the charts so that it makes it impossible to figure out what, when and if all the charts are here.⁹

With respect to the appellant's contentions the Government concedes that sufficient clocks were not available at the inception of the contract;¹⁰ that the clocks did not al-

ways function properly; that an error in numbering the charts did occur;¹¹ and that there were a few cases where the clock ran down before the chart could be changed.¹² The Government also acknowledges that the recorders were installed by its inspector rather than by the contractor.¹³ It denies, however, that any charts are missing¹⁴ and asserts that the chart not being marked

¹¹ "Basically this is how the charts became mixed up and were incorrectly numbered. The clocks were not moved from grader to grader. One of the clocks that did not function properly was removed from one of the graders and replaced. After the error was discovered the charts were rearranged and put back in chronological order. This was done by placing them in order relative to the engine hour meter reading and comparing this against the dates of operation. * * *" (Exhibit 8, note 12, *supra*, p. 2.)

¹² In his memorandum to the contracting officer dated November 19, 1971 (Exhibit 14), the BLM District Manager, Boise offers the following explanation:

"* * * This occurred when wet soil conditions prohibited the inspector from reaching the machine before the clock ran down. Whenever the operator reached the machine before the inspector did, he conferred with the operator and obtained the hours not recorded on the chart from him."

¹³ "After a review of the inspectors log and records, it was determined that all but two of the clocks were installed with the assistance of Mr. Culverwell's employee. In these four cases the inspector asked [the] employee where he wanted the clock and it was installed with his help. The fifth clock was installed by the inspector at the location designed [sic] by the operator. We do not know the exact circumstances under which the sixth clock was installed." (Exhibit 8, note 12, *supra*.)

The appellant has offered no proof to show that the clocks were improperly installed or that where they were installed adversely affected their operation.

¹⁴ "3. There can not be any charts missing since they all run in sequence by dates without any gaps. Also, there are no gaps between the engine hour meter readings which were recorded on each chart as a double check." (Exhibit 14; memorandum to the contracting officer from the BLM District Manager, Boise, dated November 19, 1971, p. 2.)

⁹ The Government suggests that other causes may have been responsible for the substantial differences between the parties as to the hours involved. In the memorandum to the contracting officer dated October 1, 1971 (Exhibit 8), the BLM District Manager, Boise states at page 2:

"After meeting with Mr. Culverwell and comparing the clock hours against some of the employee's time, we feel that the major discrepancy lies between the clock hours and employees' time on graders #1 and #2. The operators of graders #1 and #2 serviced most of the other units; therefore, it is possible that some of this time could be attributed to servicing. Servicing requirements for 6 graders located several miles apart could range anywhere from 100 to 150 hours for the duration of this contract."

¹⁰ "* * * Clocks were not available for all of the patrols at the beginning as several clocks were borrowed from another district and were not received in time. During this interim period, the inspector and operator agreed on the number of hours of operation. * * *" (Exhibit 8, Government memorandum dated October 1, 1971, p. 1.)

September 26, 1972

properly was observed in only a few instances. The District Manager, Boise offers the comment: "Whenever there was any doubt the contractor was given the benefit."¹⁵

Apparently recognizing that records compiled in the circumstances outlined above¹⁶ leave much to be desired from the standpoint of accuracy, the Government has consistently evidenced an interest in securing additional data from the contractor in support of the claims asserted. Illustrative are the comments of the District Manager, Boise on the Claims presented:

We believe that a comparison of the contractors payrolls with the charts would be very helpful in resolving the claim for additional hours. We have enclosed a spread sheet that we prepared, which shows a comparison between some of the charts and the hours paid the employees. We obtained this information in our first meeting with CIC when we attempted to reach an agreement with respect to the number of hours.

We felt that most of our differences could be resolved by comparing the charts against CIC's payroll figures. Mr. Culverwell, however, said he did not have all the hours with him and that he would

rather not divulge all the information in case he had to appeal.¹⁷

Neither payroll data nor other information supporting the appellant's claim for additional equipment rental hours was furnished to the Board in response to the settling of the record notice dated June 8, 1972 (by which the parties were invited to supplement the record with documents and exhibits), even though the significance of such data had been stressed in the Government's answer dated March 15, 1972,¹⁸ and had been elaborated upon considerably in the Department counsel's letter of the same date to appellant's counsel.¹⁹ From the evidence of record²⁰ we conclude that for reasons best known to itself the appellant has failed to furnish relevant information in its possession²¹

¹⁷ Exhibit 14, note 16, *supra*.

¹⁸ " * * * If the Appellant has records to support additional adjustments, the Government would consider such records to determine whether a further adjustment is appropriate." (Government Answer, p. 2.)

¹⁹ "With respect to the appeal on the number of hours of equipment use, I note a report from the Bureau of Land Management District Office in Boise indicates a willingness to attempt to resolve the differences in the hours by comparing the time clock charts with the company's payrolls. * * * If your clients payrolls could be made available now for comparison with the Bureau of Land Management records, I believe the disposition of this claim could be facilitated, either by clarification of the respective positions of the parties or, possibly, a settlement of it. I understand that Mr. Culverwell already has been provided with copies of the time clock charts. If there are BLM records that you feel would be helpful in your further review we will be glad to make copies available to you."

²⁰ Text accompanying note 19, *supra*.

²¹ See *New England Tank Industries, Inc.*, ASBCA No. 6670 (November 29, 1961), 61-2 BCA par. 3233 at 16,761: ("13. Appellant's conduct of this appeal proceeding has left us without evidence concerning a number of mat-

¹⁵ Exhibit 14, note 16, *supra*.

¹⁶ It is clear that not all of the difficulties stemmed from limitations inherent in relying primarily upon clocks and charts for record keeping. This is evident from the observations made by the BLM District Manager, Boise:

" * * * After the clocks were installed the inspector's coordination with the operators became much less because of his increasing responsibility to supervise all of the units operating. At one point in the contract, the inspector was supervising 7 motor graders and 2 crawler tractors at four different locations, which were up to 30 miles apart. We attempted but were unable to provide additional assistance to the inspector because of annual work plan project commitments, man-month and per diem limitations." (Exhibit 8, note 12, *supra*, pp. 1, 2.)

having a direct bearing on the question of the equipment rental hours properly chargeable to the contract. Except for the assertions in the notice of appeal and again in the complaint that the contractor's records reflect the hours claimed for contract item Nos. 1, 2, and 3, the record is entirely devoid of evidence to support the appellant's claims. Mere allegations are not acceptable as proof of claims for additional compensation.²² The contractor has failed to sustain his burden of proof and the claims are therefore denied.²³

GOVERNMENT MOTION TO DISMISS

The notice of appeal from the contracting officer's decision of October 13, 1971 (Exhibit 9) and the complaint include claims for (i) the hours the motor graders covered by items No. 1 and No. 3 were allegedly used in excess²⁴ of the 25 percent figure specified in Paragraph 9 of the Special Provisions;²⁵ (ii) the 1,500 hours the motor graders were allegedly involved in new construction as contrasted with the road maintenance contemplated by the

ters * * * including information and evidence within its sole or superior knowledge. * * * we find in this situation occasion for reference to the so-called principle of inference of adverse testimony which sometimes may arise when a party fails to produce or account for an important witness or item of evidence. * * *) *Cf. Paccon, Inc. v. United States*, 185 Ct. Cl. 24, 40 (1968) in which the Government was found to be chargeable with producing evidence peculiarly within its possession.

²² *Kreider Brothers*, IBCA-545-2-66 (April 5, 1967), 67-1 BCA par. 6260.

²³ *Advance Construction Co., Inc.*, FAACAP No. 67-4 (July 25, 1966), 66-2 BCA par. 5713.

Cf. West Coast Dredging, Inc., IBCA 906-6-71 (November 26, 1971), 78 I.D. 338, 344, 71-2 BCA par. 9168 at 42, 535 in which the Board stated:

"In an apparent effort to bridge the gaps in the evidence, the appellant asserts that it has additional evidence to substantiate its position. If this is indeed the case, it is surprising that no such evidence was submitted in response to the Board's settling of the record notice. In any event, it is clearly incumbent upon the parties to present to the Board whatever evidence they have relevant to the issues in dispute if they wish such evidence to be considered by the Board in reaching its decision." (Footnotes omitted)

²⁴ The differences between the parties are reflected in the following schedule:

Item No.	Equipment hours		Findings October 13, 1971	Complaint	Findings March 16, 1972	Amount of claim	
	Estimated hours	Complaint				Per hour	Total
1.....	600	797¾	697¾	47¾	0	\$9.07	\$433.09
2.....	600	568¾	510¾				
3.....	600	883¾	827¾	135¾	77¾	10.15	*1,377.86

* When correctly computed the claim is in the amount of \$1,357.56 (883¾ hours - 750 hours = 133¾ hours).

²⁵ Note 6, *supra*. Concerning this claim the contracting officer's decision of March 16, 1972, states at page 2:

"Even if you operated the equipment for the number of hours claimed by you, an additional allowance as claimed in Items 2a

and b of your Notice of Appeal is not allowable because of the express language of said Section 9 of the 'Special Provisions for Equipment and Aircraft Rental Contracts * * *.'"

A copy of this decision was included as Exhibit A to the Government's Brief and Motion to Dismiss claims dated July 10, 1972.

contract;²⁶ the costs involved in processing the claims including attorneys' fees;²⁷ and the actions of a Government inspector.²⁸

²⁶ For the 1,500 hours of new construction said to be involved, the appellant asserts that it is entitled to be paid an additional \$10 per hour resulting in a total claim for this item of \$15,000. At an earlier time the appellant had stated that it was willing to forego this claim if the claims presented with its letter of August 16, 1971 (Exhibit 6) were "resolved expediently." (Note 9, *supra*.) Properly computed the claims so presented totaled \$3,288.18 (note 4, *supra*).

Insofar as the record discloses the Notice of Appeal dated November 5, 1971, was the first written notice to the Government of the contractor's claim for "new construction." This was over four months after the contract was determined to be substantially complete on June 25, 1971 (Exhibit 10).

²⁷ See *Dittmore-Freimuth Corp. v. United States*, 182 Ct. Cl. 507, 542 (1968) ("Expenses in attempting to obtain administrative relief, or in preparing for and conducting the present litigation are not recoverable. *Roy C. Rash v. United States*, 175 Ct. Cl. 797, 810-11, 360 F.2d 940, 947 (1966).")

²⁸ This claim is in an unspecified amount. The appellant has not even alleged in what manner the statements attributed to the inspector increased the contractor's costs. In an undated but signed statement the inspector concerned has denied that he denigrated the contractor to his employees. In the same statement the inspector makes the following comment:

"* * * the job was very satisfactory, in my opinion, and I felt the government and contractor both achieved a good job and had good relations up till now." (Exhibit 13.)

The appellant has failed to furnish any statement from its employees or to even give the names of the parties upon whom he relies for the serious allegations made against the inspector. Even if it had been shown by unassailable evidence that the statements in question had been made by the inspector and that such statements had adversely affected contract performance, however, the claim would be entirely outside the scope of our jurisdiction. See *Great Falls Terminal Warehouse, Co., ASBCA Nos. 12778 and 12864* (July 12, 1968), 68-2 BCA par. 7138 at 33,079 ("Appellant's attempt to recover money damages for defamation of character or loss of reputation is a matter which does not arise, and is not redressable, under the contract * * *").

The Government's answer noted that none of the above-enumerated claims had previously been presented to the contracting officer for decision and that consequently such claims were not properly before the Board whose jurisdiction is appellate only.²⁹ The same day the Government's answer was filed (*i.e.*, March 15, 1972), the Department Counsel wrote to appellant's counsel to say that the Government's answer had been prepared in the context of this jurisdictional situation.

Subsequently the contracting officer issued findings of fact dated March 16, 1972,³⁰ in which after adverting to the appellate nature of the Board's jurisdiction he stated:

Your statement of these points in the Notice of Appeal and the Complaint will be considered as a submission of them to the undersigned for a decision, so that, in the event you are not in agreement with this decision, you may then file an appeal to the Board of Contract Appeals. * * *

Thereafter, on the basis of the information available, he found that claims (i), (ii) and (iii) as listed above were lacking in merit. With respect to claim (iv) the contracting

²⁹ See *Crowder Construction Co., IBCA-570-5-66* (December 8, 1967), 67-2 BCA par. 6726 at 31,144 ("Our jurisdiction is appellate in nature. We have held repeatedly that appeals founded on claims or factual situations presented for the first time in a contractor's notice of appeal or brief, and which were not presented to the contracting officer or considered in his decision, are beyond our jurisdiction * * *"). (Footnote omitted.)

³⁰ A copy of such findings and a copy of Certified Receipt No. 46587 showing that the findings were received by the contractor on March 20, 1972, were included as Exhibit A to the Government's Brief and Motion to Dismiss Claims dated July 10, 1972.

officer noted that the project inspector concerned had denied that he had made any of the derogatory statements about the contractor attributed to him but that even if it could be found that the contractor's contentions were valid, the contract would not provide a basis for recovery.³¹

The concluding paragraph of the March 16, 1972 letter, contains the following statement:

This decision is made in accordance with the Disputes clause and shall be final and conclusive as provided therein, unless, within 30 days from the date of receipt of this decision, a written Notice of Appeal (in triplicate) addressed to the Secretary of the Interior is mailed or otherwise furnished to the Contracting Officer.³²

The Department counsel states that a copy of the March 16, 1972 decision was also sent to appellant's counsel.³³ Although the decision in question was received by the contractor on March 20, 1972,³⁴ the contractor failed to take an appeal therefrom. In moving to dismiss the four claims involved Government counsel states:

The contractor not having appealed the contracting officer's decision dated March 16, 1972, relating to the new issues raised affirmatively for the first time in the

complaint,³⁵ to-wit, (1) overrun of hours, (2) claims for new road construction work instead of maintenance, (3) claim preparation expense and attorneys' fees, and (4) damages for alleged statements attributed to a BLM inspector, the Government hereby moves that the Board dismiss said claims on the ground that they are not properly before the Board of Contract Appeals.³⁶

The continued failure of the appellant or his counsel to make any response (i) to the contracting officer's decision of March 16, 1972, denying the four claims asserted for the first time in the notice of appeal (ii) to the Order Settling Record dated June 8, 1972, or (iii) to the Government's Brief and Motion to Dismiss Claims dated July 10, 1972, would appear to be ample grounds for concluding that the four claims in question have been abandoned.³⁷ There is no reason for us to reach that question, however, where, as here (1) the appellant has failed to take any appeal from the contracting officer's decision denying the claims presented and (2) the Disputes³⁸ clause contained in the contract provides that "Such decision shall be final and conclusive unless, within 30 days from the date of receipt thereof, the Contractor mails or otherwise furnishes to the Contracting Officer a written ap-

³¹ See note 30, *supra*.

³² The balance of the paragraph contains instructions as to the requirements for perfecting an appeal and states that a copy of the Board's rules is being provided for the contractor's information.

³³ Government's Brief and Motion to Dismiss Claims dated July 10, 1972, p. 4.

³⁴ Note 32, *supra*.

³⁵ The issues were raised affirmatively for the first time in the notice of appeal dated November 5, 1971.

³⁶ Note 35, *supra*, pp. 4-5.

³⁷ The record discloses that no action has been taken by the appellant in the nine months that have elapsed since the filing of its complaint with the Board on December 16, 1971.

³⁸ Clause 3, Disputes.

ESTATE OF FLORENCE BLUESKY VESSELL
(UNALLOTTED LAC COURTE OREILLES
CHIPPEWA OF WISCONSIN)
September 27, 1972

peal, addressed to the head of the Federal Agency." Appellant's references to the claims in its notice of Appeal and Complaint served prior to the issuance of the March 16 decision are regarded as premature and do not satisfy that requirement.³⁰

The claims covered by the contracting officer's decision dated March 16, 1972, are therefore dismissed with prejudice.

CONCLUSIONS

1. The contracting officer's decision dated October 13, 1971, pertaining to the appellant's claims for additional equipment rental hours under Contract item Nos. 1, 2 and 3 is hereby affirmed.

2. The four claims covered by and denied in the contracting officer's decision dated March 16, 1972, from which decision no proper appeal was taken are hereby dismissed with prejudice.

WILLIAM F. MCGRAW, *Chairman.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

³⁰ *Blackhawk Heating & Plumbing Co., Inc.*, VACAB No. 903 (April 23, 1969), 69-1 BCA par. 7630; *Cf. Maney Aircraft Parts, Inc.*, ASBCA No. 14363 (April 28, 1972), 72-1 BCA par. 9449. See also *SWH Company*, DOT CAB No. 72-29 (June 29, 1972), 72-2 BCA par. 9570.

ESTATE OF FLORENCE BLUESKY VESSELL

(UNALLOTTED LAC COURTE
OREILLES CHIPPEWA
OF WISCONSIN)

1 IBIA 312

Decided September 27, 1972

Petition to permanently stay enforcement of an order to show cause challenges the constitutionality of a Wisconsin statute, and the matter was certified by Administrative Law Judge Vernon J. Rausch to the Board of Indian Appeals for exercise of the Secretary's authority delegated to the Board.

PETITIONED DENIED: A temporary stay of 60 days from the date hereof is issued herein.

100.0 Indian Probate: Generally

The Department of the Interior does not have authority to declare a statute of a state to be unconstitutional as being in violation of the constitution of the United States.

140.0 Indian Probate: Attorneys at Law: Generally

An attorney appearing in Indian Probate proceedings must disclose the name of the party represented by him.

APPEARANCES: Wisconsin Judicare by Peter J. Sferazza for Constance Jean Hollen Iskra.

OPINION BY MR. McKEE

INTERIOR BOARD OF INDIAN APPEALS

This matter arose upon the issuance of an order by Administra-

tive Law Judge Vernon J. Rausch on March 3, 1972, to show cause why his previous order determining heirs in this estate issued February 8, 1971, should not be modified to eliminate Constance Jean Hollen Iskra from those entitled to share in the estate. Operation of the order is now temporarily stayed.

This decedent, Florence Bluesky Vessel, was an unallotted member of the Lac Courte Oreilles Chippewa Indian tribe who died intestate possessed of trust or restricted property in the State of Wisconsin on November 2, 1964. She died at the age of 55 years, unmarried, without issue or father or mother. Her heirs were determined to be collateral relatives including Constance Jean Hollen Iskra whose share in the estate was determined to be a 1/45. Constance is the grandchild of the decedent's predeceased sister, Libby Bluesky Thayer, and the daughter of decedent's predeceased niece, Florence Thayer Hollen. Constance Iskra was shown to have two half sisters, Faye Elizabeth Hollen Gable and Ilene Loretta Hollen, each of whom was also shown to have a 1/45 share in the estate. The elimination of Constance Iskra from among the heirs entitled to take would increase the shares of Faye Gable and Ilene Hollen from a 1/45 each to a 1/30 each. No interest of any other heir, as determined in the order of February 8, 1971, is to be in any way affected.

The show cause order issued on March 3, 1972, was issued *sua*

sponte by Judge Rausch upon receipt of a communication from the Superintendent of the Great Lakes Agency of the Bureau of Indian Affairs having jurisdiction of the trust property involved. It was called to the judge's attention that in previous probate decisions involving this family. Constance Iskra was shown to be the illegitimate child of Florence Thayer Hollen born prior to Florence's marriage to Knofel F. Hollen.

Although Constance shared in her mother's estate, she had been barred from sharing in the estate of Marian James Bluesky or Marian Caldwell, probate No. A-42-64, a predeceased maternal great aunt who died intestate and therefore the estate passed under the laws of descent of Wisconsin. Constance was barred from taking as an heir in Marian's estate by the provisions of the Wisc. Stat. Ann. sec. 237.06 (1957):

237.06 Heirship of illegitimates

Every illegitimate child shall be considered as heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child or who shall be adjudged to be such father under the provisions of ss. 52.21 to 52.45, or who shall admit in open court that he is such father, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother any part of the estate of his or her kindred, either lineal or collateral, unless before his death he shall have been legitimated by

the marriage of his parents in the manner prescribed by law. (*Italics supplied.*)

There was no evidence of the illegitimacy of Constance in the record in this probate at the time of the issuance of the order determining heirs on February 8, 1971, but such evidence does appear in the probate records in the estates of the decedent's mother, Florence and of her great aunt Marian. This evidence is the basis for the issuance of the show cause order by Judge Rausch, and the applicable Wisconsin Statute, above quoted, would appear to require that it be granted.

As a result of the issuance of the show cause order, a letter of protest to the proposed action was written to the Judge by Faye Gable, and he was contacted for the same purpose by Loretta Thayer Howard, an aunt. The Lac Courte Oreilles Tribal Governing Board wrote a letter of protest, but no contest of record was made by Constance Iskra.

Thereafter, Peter J. Sferrazza, staff counsel of Wisconsin Judicature, filed a petition opposing the action proposed by the judge, but he failed to state for whom he is appearing. Thereupon this Board required Mr. Sferrazza file his certificate designating the parties represented by him. It is to be noted that Constance Iskra is the only indispensable party and the only one who is in a position to challenge the judge's proposed action, as set forth in the order to show cause. Her half sisters, Faye Gable and Ilene Hol-

len stand to benefit by the announced intention to change the probate order. Mr. Sferrazza, having filed an appearance on behalf of Constance Iskra the petition will be considered on its merits.

In the petition it is pointed out that the statutes regarding the rights of illegitimate children to inherit from collateral relatives was amended effective April 1, 1971, and appears as Wisc. Stat. Ann. § 852.05 (1971):

852.05 Status of illegitimate person for purposes of intestate succession.

(1) *An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (a) his mother, and (b) his father if the father has either been adjudicated to be such under ss. 52.21 to 52.45, or has admitted in open court that he is the father, or has acknowledged himself to be the father in writing signed by him.*

(2) Property of an illegitimate person passes in accordance with s. 852.01 except that the father or his kindred can inherit only if the father has been adjudicated to be such under ss. 52.21 to 52.45.

(3) This section does not apply to a child legitimated by the subsequent marriage of his parents under s. 245.25, and status of an illegitimate child who is legally adopted is governed by s. 851.51. (*Italics supplied.*)

The statutory bar to inheritance by one in Constance's situation has been removed, but the change comes too late to affect her rights.

In the petition the constitutionality of the former statute is attacked as follows:

It is our contention that Wisc. Stat.

247.06 prior to its amendment in 1971 was unconstitutional, because it prohibited an illegitimate child from inheriting lineally or collaterally through her natural mother. This constitutes invidious discrimination against illegitimate children contrary to the equal protection clause of the 14th Amendment of the United States Constitution.

And the petitioners ask,

The petitioners move the Hearing Examiner (Now Administrative Law Judge) to make permanent his order staying his "order to show cause" dated March 3, 1972.

To permanently stay the Order to Show Cause and allow Constance to remain an heir would require removal of the effect of the former Wisconsin Statute. Both the original petition and the material contained in a brief in letter form to Judge Rausch by Mr. Sferrazza received August 15, 1972, have been considered. This letter is a supplement to the original petition and brief, and in it a recent decision of the Supreme Court of the United States is cited and discussed. We find that the petition and supplemental letter have raised a serious constitutional challenge to the former Wisconsin statute, and that this matter has been properly certified to this Board for an immediate decision of the Department. However, the Department is without authority to declare the Wisconsin legislation unconstitutional. Only the courts have the authority to take action which runs counter to the will of the legislature. 3 Davis, *Administrative Law Treatise*, § 20.04; *Public Utilities Commission v. United States*, 255 U.S. 534, 539 (1958). *Estate of Benjamin Har-*

ison Stowhy, 1 IBIA 269, 79 I.D. 426 (1972).

Because of the Department's inability to entertain a challenge to the constitutionality of an act of the legislature of the State of Wisconsin, the Administrative Law Judge acted correctly in certifying the issue to the Board. It is the policy of the Department of the Interior to expedite the exhaustion of a petitioner's administrative remedy whenever the petitioner, in good faith, raises a serious issue as to the constitutionality of an act the Department is charged with following, so that he may pursue the proper relief in the courts. Such a policy not only affords prompt relief to the petitioner, but assists Departmental officials in properly meeting their responsibilities.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals, Office of Hearings and Appeals, by the Secretary of the Interior, 211 DM 13.1 and 13.7; 35 F.R. 12081, IT IS ORDERED:

1. That the petition to permanently stay the order to show cause is DENIED, but such order is temporarily stayed for 60 days from the date hereof pursuant to 43 CFR 4.296;

2. That this decision shall be executed and distributed by the Administrative Law Judge pursuant to 43 CFR 4.296.

This decision is final for the Department.

DAVID J. McKEE, *Chairman*.

I CONCUR:

DANIEL HARRIS, *Member*.

(BEARING DECEASED WIND RIVER ALLOTTEE NO. 6323)

September 28, 1972

**ESTATE OF JENNIE L. BROWN
BEARING DECEASED WIND
RIVER ALLOTTEE NO. C323**

1 IBIA 320*Decided September 28, 1972*

This is a petition to reopen an estate, filed 32 years after it was closed, and requesting the elimination of an heir because there was no record of his adoption.

Denied.

110.0 Indian Probate: Adoption: Generally

Where the death of the decedent and the probate of his estate occurred prior to the effective date of 54 Stat. 746, 25 U.S.C. sec. 372a (1970), on January 8, 1941, a lack of a written record of an adoption completed during decedent's lifetime is no bar to recognition of such adoption in a proceeding to determine decedent's heirs.

121.0 Indian Probate: Aggrieved Parties: Generally

A petition to reopen an estate which has been closed more than three years will be summarily denied when neither the petition nor the record reveal that the petitioners have any interest in the estate.

375.1 Indian Probate: Reopening: Waiver of Time Limitation

The Secretary will not exercise his discretion to waive time limitations for reopening a probate when it has been closed 32 years and there is a lack of diligence on the part of the petitioners during such period to obtain correction of an alleged mistake which they fail to attribute to fraud, accident or mistake in the original proceedings, and when they fail to allege the existence of a manifest injustice or

how it might be corrected if reopening were permitted.

APPEARANCES: There were no appearances in behalf of any party.

OPINION BY MR. McKEE

**INTERIOR BOARD OF
INDIAN APPEALS**

This matter comes before the Board upon the petition for "rehearing" filed by Anna M. Brown and Richard Brown, Jr., dated August 21, 1972, addressed to the Superintendent, Wind River Agency, and which was received in the office of the Administrative Law Judge William Hammett on August 23, 1972. The petition consisting of one paragraph is as follows:

We wish to petition for a rehearing in the estate of Jennie L. Brown, Probate No. 45647-40, dated July 29, 1940. The reason for this petition is because Richard Addison received a $\frac{1}{3}$ interest and is called an adopted son. There is no records that Richard Addison was legally adopted by Mrs. Brown but that she only kept him and raised him and we think he should not inherit as an adopted son. (*Italics supplied.*)

Since the estate had been closed by a Secretarial order determining heirs issued July 29, 1940, more than three years prior to the filing of this petition, Judge Hammett forwarded such petition to the Board on September 1, 1972, in accordance with the provisions of 43 CFR 4.242 (h). His recommendations are contained in his transmittal memorandum as follows:

Enclosed is a petition for rehearing, which I have considered as a petition for reopening of the above estate.

247.06 prior to its amendment in 1971 was unconstitutional, because it prohibited an illegitimate child from inheriting lin-

The order determining heirs in this estate, a copy of which is enclosed, was issued July 29, 1940. The order lists Dickie (Richard) Addison as an heir of the decedent by virtue of being decedent's adopted son. The testimony given at the hearing, relevant parts of which are enclosed, discloses sufficient grounds for the examiner's determination that Dickie (Richard) Addison was an adopted son of the decedent. Therefore, I conclude that there is an absence of manifest injustice and that the petition should be denied. I recommend that this action be taken.

The petition, properly treated as a petition for reopening, is subject to summary dismissal for the following reasons:

There is sufficient evidence in the record to substantiate the findings that Richard Addison was the adopted child of Jennie L. Brown; that Jennie L. Brown only had two other children and that each should receive one third of her estate, and

There was no requirement that a formal record of adoption be made on July 29, 1940, at the time the estate of Jennie L. Brown was probated—the statute concerning adoption records, the Act of July 8, 1940, 54 Stat. 746, 25 U.S.C. sec. 372(a) (1970), provides by its terms that it "shall become effective six months after the date of its approval;" and

There is a lack of diligence on the part of petitioners in waiting thirty-two years without apparent objection to the probate of this estate, and

There is nothing in the petition or probate record to show that the

petitioners have any interest in the estate; nor are they parties as defined in the applicable regulations in 43 CFR 4.201(i), and

There is nothing in the petition or the probate record to show any need for additional evidence or any possible claim to be made; nor any showing that petitioners are able to establish any claim and meet the burden of proving it by a preponderance of the evidence. *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971), and

There is nothing in the petition or the probate record to show that the original determination resulted from fraud, accident or mistake of such compelling nature that a manifest injustice will occur or how it might be corrected if a reopening is granted.

CONCLUSION

It is therefore concluded that this petition for reopening is insufficient to justify the exercise of Secretarial discretion to waive the three-year limitation contained in the regulations 43 CFR 4.242(a).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7, 35 F.R. 12081, IT IS ORDERED that the petition for reopening filed by Anna M. Brown and Richard Brown, Jr., shall be and the same is hereby DENIED.

This decision is final for the Department.

DAVID J. McKEE, *Chairman*.

I CONCUR:

DANIEL HARRIS, *Member*.

**ESTATE OF CRAWFORD J. REED
(UNALLOTTED CROW NO. 6412)****1 IBIA 326***Decided September 28, 1972*

Appeal from an Examiner's Order Determining Heirs After Rehearing.

Affirmed.

130.3 Indian Probate: Appeal: Examiner as Trier of Facts

Where there is sufficient evidence to support the finding and the testimony is conflicting, the determination of witness credibility and the findings of fact by the Examiner will not be disturbed because only he had the opportunity to hear and observe the witnesses.

140.2 Indian Probate: Attorneys at Law: Fees

The allowance of attorney's fees is discretionary and based not only on the results produced but on what the service themselves are worth considering the labor, time, talent and skill the attorney expended.

160.1.3 Indian Probate: Children, Illegitimate: Right to Inherit: Child from Father

Once a child has been determined to be a child of a deceased Indian, Title 25 U.S.C. sec. 371 applies and authorizes the descent of its deceased father's lands to the child as an heir whether the parents of the child cohabited or not.

APPEARANCES: Thomas E. Towe on behalf of George Reed, Sr., for the appellant; and James E. Torske on behalf of Jennifer Ann Walks, the respondent.

OPINION BY MR. HARRIS**INTERIOR BOARD OF
INDIAN APPEALS**

Crawford J. Reed died on September 20, 1968, at the age of 27 years. On October 9, 1969, Hearing Examiner (Indian Probate) David McKee held a hearing to determine the heirs of the deceased.

At the hearing it was determined that Crawford Reed had died intestate and single without ever having married. Laura Ground, mother of Alice Ground, who did not appear, testified that Gladys Ann Ground, born March 2, 1965, was the daughter of Alice Sees the Ground and Crawford Reed, Adelia Walks testified that Crawford Reed was the father of her child, Jennifer Ann Walks, who was born on July 19, 1967. George Reed, Sr., testified that he and Ruby Good Horse, who had predeceased Crawford, were the parents of Crawford Reed.

The Secretary, because of the unavailability of Examiner McKee, issued the Order Determining Heirs on October 23, 1970. This decision, based on the hearing record and in accordance with the laws of Montana, declared Gladys Ann Ground and Jennifer Ann Walks to be Crawford Reed's heirs at law and fixed their shares in the estate at one-half each.

George Reed, Sr., the surviving father of Crawford, would have received all his property were it not

for the Secretary's Order. George Reed, Sr., filed a petition for rehearing on December 7, 1970. The petition was granted on January 6, 1971.

The rehearing, held on April 15, 1971, held by Examiner Daniel Boos was actually a complete and lengthy hearing *de novo*. The testimony of the witnesses at the rehearing is in conflict on whether Crawford J. Reed was the father of Jennifer Walks. Adelia Walks testified that she "slept with Crawford Reed" the first part of November 1966 at Sylvia Fighter's place; that she became pregnant and told Crawford. Sylvia Fighter testified that they stayed together at her place and that Crawford later told her Adelia was pregnant. Adelia, her mother, and Alice Ground testified that Crawford acknowledged he was the father of Jennifer Walks. Others testified that Crawford had bought things for Jennifer and paid her medical bills.

Rena Half testified that she lived with Crawford as man and wife at Pryor, Montana, from September until December of 1966 and was with him day and night. Court records introduced at the rehearing showed Rena had been arrested and incarcerated for three and a half days and had been at the Crow Agency on several occasions during the same period of time. With respect to the testimony of Rena Half the Order appealed from stated, "Further, having closely observed the appearance and demeanor of the witness, the Examiner gives no credence to her testimony."

Following the rehearing the attorney for Jennifer Walks, on April 23, 1971, filed a petition for attorney's fees for services he had provided in connection with the preparation and presentation of her cause at the rehearing.

On December 6, 1971, Examiner Daniel Boos issued an Order Determining Heirs After Rehearing. The examiner made a specific finding, "that the evidence is insufficient to support a finding that Crawford J. Reed was the father of Gladys Ann Ground" and "That the weight of the evidence preponderates in favor of the claimant, Jennifer Walks," that "Crawford J. Reed was (her) father." Examiner Boos accordingly found her to be the sole heir at law and declared her to be entitled to all of the estate of Crawford J. Reed. The examiner also allowed the claim of \$200 for attorney's fees.

Gladys Ann Ground did not appeal the examiner's order.

George Reed, Sr., has appealed the Order After Rehearing to this Board. His stated grounds for appeal are that "the evidence introduced at the hearing is insufficient to sustain a finding that Crawford J. Reed was the father of Jennifer Walks" and "that 25 U.S.C. sec. 371 does not apply to this case and, therefore, even if Jennifer Walks was the daughter of Crawford J. Reed, she would not be entitled to inherit the property of the deceased."

Whether Jennifer Walks is the child of Crawford J. Reed is a question of fact. We find that, if ac-

cepted as credible, there is sufficient evidence in the record to support such a finding of fact. Once the fact is determined, we can proceed to determine its significance under the applicable law. Where the testimony is in conflict, as here, the examiner as the trier of fact must resolve the questions on the sufficiency of the evidence or on witnesses' credibility to reach the true facts. On the question of credibility, such elements as interest of the witness in the outcome of the case, relationship of the witness to others, and what the witness said can only be partially evaluated on the record of the hearing. Equally important in the determination of credibility of the witnesses' statements to resolve questions of fact is the manner and demeanor of the witness on the stand—how he said what he said, etc. Therefore, where there is sufficient evidence to support the finding and the testimony is conflicting, the determination of witness credibility and the findings of fact by the examiner will not be disturbed, because only he had the opportunity to hear and observe the witnesses. This is a long standing Departmental policy which has the approval of this Board. *Estate of Abner Henry Hall*, Deceased Blackfeet Indian Allottee No. 751, IA-4 (December 9, 1949); *Estate of Albert Attocknie*, IA-1442 (February 7, 1966); *Estates of Josie Carroll Mustache and John Mustache, Sr.*, IA-1262 (April 4, 1966). See *Estate of William Cecil Robedeaux*, 1 IBIA 106, 78 I.D. 234

(1971). The Board finds that there is sufficient credible evidence to find that Jennifer Walks is the child of Crawford J. Reed, and we so rule.

The purpose of both the original hearing and the rehearing which were held in this case was to ascertain the heirs of a deceased Crow Indian, Crawford J. Reed, in order to determine the descent of lands held in trust for him. On its face 25 U.S.C. sec. 371 applies to this case:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348, of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: * * *

Jennifer Walks having been determined to be the child of Crawford J. Reed, this section is the authority for declaring her to be his legitimate child for the purpose of allowing the descent of his trust lands to her. The argument advanced by appellant, George Reed, Sr., that sec. 371 only applies to children born of Indian parents who cohabit as man and wife is both unreasonable and against the weight of authority. For the purpose of determining descent of land, by its terms sec. 371 applies both to such children and "every Indian child,

otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father." The plain meaning of the words leads to the reasonable conclusion that Congress intended to protect the right to inherit from the father for both classes of children, those born of parents who cohabited and those born of parents who did not. To this effect see *In Re House*, 112 N.W. 27, 132 Wis. 212 (1907), *Gray, et al. v. McKnight, et al.*, 183 P. 489, 75 Okla. 268 (1919), *Solicitor's Opinion*, 58 I.D. 149 (1942), *Estate of Harry Colby*, 69 I.D. 113 (1962), and *Estate of Nelson Drags Wolf*, IA-D-12 (September 19, 1967).

Appellant cited both *In Re House*, *supra* and the *Solicitor's Opinion*, *supra* and argued both were wrong with respect to the issue born of parents who did not cohabit because both cases (according to appellant) held that such issue could inherit from the father only and could not inherit from the mother. Appellant argues that since it is unreasonable to deny a child the right to inherit from the mother the holding in both cases should be thrown out.

Appellant's interpretation of both cases is incorrect. Through the court's interpretation of 25 U.S.C. sec. 371 the illegitimate children of Thomas House were allowed to inherit from him in *In Re House*, *supra*—the question of inheritance from the mother was not before the court. In the *Solicitor's Opinion*, *supra* the first question was whether the illegitimate nephew, whose

mother was deceased, could inherit through his mother and receive part of the estate of his uncle. The second question was whether the 14 legitimate children of a predeceased illegitimate half brother whose mother was deceased were entitled to inherit through him and his mother and receive part of the estate which was in probate. On both questions the Solicitor held that the children of the father could inherit from him under 25 U.S.C. sec. 371, but that Congress had left the question of whether illegitimate children of the mother could inherit from the mother or through her to state law and the controlling state law, while providing that they could inherit from her, prohibited inheritance through her, absent certain circumstance.

Since the question before this Board is whether Jennifer Walks can under 25 U.S.C. sec. 371, inherit from her father, it can be seen that under the decision in both *In Re House*, *supra* and the *Solicitor's Opinion*, *supra* she can so inherit and this Board so holds.

The attorney for respondent on June 7, 1972, and subsequent to the filing of briefs and a reply brief, filed a petition for allowance of \$480 attorney's fees in connection with the services he provided respondent on this appeal. Title 43 CFR Part 4, sec. 4.281 (a) and (b) provides for such petitions, and, as a matter of discretion, provides that the fee may be charged against the interest of the person represented. The fee to be allowed is dependent on the

worth of the services provided, *i.e.*, *quantum meruit*. The reasonable worth of legal services rendered is determined not only on what such services produce, but also on what the services in themselves were reasonably worth considering the labor, time, talent, and skill reasonably expended by the attorney. *Estate of Tah-wat-is-tah-ker-na-ker or Lucy Siateen*, Deceased Comanche Allottee No. 429, 70 I.D. 531. Respondent submitted a well-written brief, displaying an able legal talent. Considering the effort and time necessarily expended to produce this brief and its contribution to the successful results for respondent's clients, the full amount of \$480, as petitioned for, is hereby allowed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7; 35 F.R. 12081, the Examiner's Order Determining Heirs After Rehearing is **AFFIRMED**.

This decision is final for the Department.

DANIEL HARRIS, *Member*.

I CONCUR:

JAMES M. DAY, *Ex Officio Member*.

THE VALLEY CAMP COAL COMPANY

1 IBMA 196

Decided September 29, 1972

Appeal by The Valley Camp Coal Company from a decision of Alfred

P. Whittaker, Departmental hearing examiner, assessing civil penalties in the total amount of twenty-one hundred dollars (\$2,100) pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969. (Docket No. below: MORG 72-8-P.)

Decision affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Negligence

An operator can be liable for a civil penalty under section 109 of the Act even though there is no showing of negligence on his part. Negligence is considered solely in determining the amount of the penalty.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation—Federal Coal Mine Health and Safety Act of 1969: Penalties: Standards

The criteria prescribed in section 109(a) of the Act and 30 CFR 4.546(a) are not considered in finding a violation of the Act.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Admissibility of Evidence—Federal Coal Mine Health and Safety Act of 1969: Penalties: Generally

The payment of a proposed order of assessment is not an offer of compromise, and when such payment is made, it does not render notices of violation and notices of termination or abatement inadmissible as evidence of the operator's history of violations.

APPEARANCES: Arthur M. Recht, Esquire, for appellant, The Valley Camp Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Stanley M. Schwartz, Trial Attorney, for appellee, U.S. Bureau of Mines.

OPINION BY INTERIOR BOARD OF MINE OPER- ATIONS APPEALS

Factual and Procedural Background

On July 26, 1971, the Bureau of Mines (Bureau) filed a petition for the assessment of civil penalties in accordance with section 100.4(i) Title 30 Code of Federal Regulations and pursuant to section 109 of the Federal Coal Mine Health and

Safety Act of 1969 (hereinafter "the Act").¹ The Bureau sought assessment of civil penalties for violations cited in six notices of violation issued to The Valley Camp Coal Company (Valley Camp). A hearing was held on the petition and, on March 20, 1972, the hearing examiner issued a decision holding that Valley Camp was in violation of the Act as to the violations cited in five of the notices² and assessed the following penalties for each violation:

<i>Violation No.</i>	<i>Date issued</i>	<i>Section of the act violated</i>	<i>Assessment</i>
1 SRK-----	June 7, 1970	304(a)	\$250
2 SRK-----	June 8, 1970	305(c)	100
1 SRK-----	Oct. 7, 1970	304(a)	500
1 JB-----	Nov. 4, 1970	302(c)	250
2 SRK-----	Dec. 15, 1970	304(a)	1,000
Total-----			2,100

Valley Camp appealed the above assessments on April 3, 1972, and, on April 19 filed its brief.

Valley Camp's brief contains four objections:

1. No penalty can be assessed if no fault is shown on the part of the operator.

2. In a penalty assessment proceeding, no violation can be found until findings adverse to the operator are made as to the six criteria contained in section 4.546(a)³ of the rules.

3. The examiner erred in admitting into evidence previous notices of violations as proof of the operator's history, because proposed penalties were paid as to all violations in accordance with 30 CFR Part 100, and therefore, they are evidence of offers of compromise and inadmissible.

4. There are insufficient facts in the record to sustain the findings for each of the five assessments.

On May 19, 1972, the Bureau filed an answer brief arguing:

1. The assessment of a penalty is mandatory once a violation is established, and the negligence of the operator is not considered except in arriving at the amount of the penalty.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The examiner vacated the petition as to one notice of violation, as the evidence was insufficient to establish a violation.

³ At the time the briefs were submitted in this case, this section was numbered 43 CFR 4.544. It has since been renumbered 43 CFR 4.546(a) (37 F.R. 11461, June 8, 1972).

2. The six criteria of section 109 (a) of the Act are considered only after a violation is established.

3. The operator owes a high degree of care to the miners, and cannot be relieved of liability even if it is shown that employee failure is in issue.

ISSUES ON APPEAL

I. Can an operator properly be assessed a penalty for a violation not caused by the fault of the operator?

II. Can a violation be established without first making a finding adverse to the operator on each of the statutory criteria prescribed in section 109(a) of the Act and 43 CFR 4.546(a)?

III. Are notices of violation, penalties for which have been paid as a result of proposed orders of assessment, admissible as evidence of a history of previous violations?

IV. Does the record support the Examiner's findings and assessments for the five violations?

I

Valley Camp's first argument is that no penalty should have been assessed, since it was not proved that the operator was at fault, but rather the evidence showed that all the violations were caused by the negligence of an employee.

We hold that an operator can be liable for a civil penalty under section 109 of the Act even though there is no showing of negligence on his part. If it is proved that a vio-

lation has occurred in a mine, the operator of that mine is subject to penalty. Negligence of the operator must be considered as one of the statutory criteria in determining the amount of the penalty, and it is within the examiner's discretion to weigh the significance of the findings on negligence.

We base our holding on our understanding of the language of section 109 and the legislative intent of that section. Section 109 states, "The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act * * * shall be assessed a civil penalty by the Secretary * * * which penalty shall not be more than \$10,000 for each such violation * * *." This language is mandatory.

Our understanding of subsection 109(a) is further supported by the legislative history of section 109. The Conference Committee Report for the Act states:

The Senate bill provided that, in determining the amount of the civil penalty only, the Secretary should consider, among other things, whether the operator was at fault. The House amendment did not contain this provision. *Since the conference agreement provides liability for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine.* H.R. Conf. Rep. No. 91-761, 91st Cong., 1st Sess., at p. 71

(1969), as cited in Legislative History Federal Coal Mine Health and Safety Act at p. 1023 (1970). (Italics added.)

II

Valley Camp's second argument is based on the language of 43 CFR 4.546(a), which states:

Where, after opportunity for hearing and consideration of the record as a whole including the operator's history of violation, the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of violation, the Examiner or the Board finds that a violation of a mandatory health or safety standard or any other provision in the Act has occurred, he or they shall determine the amount of penalty which is warranted and incorporate in the decision concerning the violation an order requiring that the penalty be paid.

Valley Camp argues that under the above rule an examiner can assess a penalty only after findings have been made on all of the criteria and the finding on each is adverse to the operator. It is Valley Camp's position that, since the language of the rule recites consideration of the criteria ahead of the requirement of finding a violation and assessment of penalty, this was the intention of the Department, which is bound by its own rule. We do not agree with Valley Camp's understanding of the rule.

Valley Camp's argument appears to have overlooked the influence of section 109 of the Act on section

4.546(a) of the rules. Section 109 states:

*The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary * * *. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. (Italics added.)*

Obviously, it was the intention of the Secretary in adopting the above rule that it be a full accord with the meaning and intent of section 109 of the Act. The rule was designed to implement penalty proceedings under that section and not intended to require more or less to establish liability for a penalty than is clearly required by the Act. Although the language of the rule may be awkward and ambiguous, it must be interpreted in light of the clear statement, meaning, and intention of section 109.

III

Valley Camp contends that Bureau's Exhibits 13-43 consisting of 16 notices of violation and 15 notices of termination or abatement should not have been admitted as evidence or considered by the examiner as a history of previous violations, because the proposed penalty was paid on each such viola-

tion.⁴ Valley Camp construes such payment to be in satisfaction of an offer of compromise and, as such, should properly have been excluded.

We do not agree with Valley Camp's analogy of proposed orders of assessment to offers of compromise, and Valley Camp has offered nothing to support such analogy. Offers of compromise are mutual concessions made without a determination of liability for the purpose of avoiding litigation. Proposed orders of assessment are, in effect, orders of the Secretary to pay a penalty assessed in accordance with section 109 of the Act and 30 CFR Part 100. Unless formal adjudication is requested by the operator, they become the final orders of the Secretary. If the operator elects not to request formal adjudication, but to pay the proposed assessment, his payment is in no sense in satisfaction of an offer of compromise and does not vacate or remove from his record the notices of violation upon which the penalties are based.

Furthermore, the rules on admission of evidence in an administrative hearing are based on a policy which favors the admission of any evidence not immaterial, irrelevant, or unduly repetitious. 5 U.S.C. sec. 556(d) (1970). We conclude that the Bureau's exhibits were properly admitted.

IV

As its final argument, Valley Camp contends that there are in-

sufficient facts in the record to sustain anything more than a nominal penalty. Upon review of the record and decision of the examiner, we believe that, except for the two notices discussed below, the amounts assessed are fair, reasonable, and in accordance with the purposes and standards of the Act. We bear in mind, as did the examiner, that Valley Camp is a large producer and that Valley Camp No. 3 Mine is a large mine. The mine employs over 400 men underground. In 1970, the mine produced 1,147,114 tons of coal for a net profit of \$515,052. In the first eight months of 1971, it produced 603,308 tons of coal and had an operating loss of \$549,374.

Findings of Negligence for Notice Nos. 2 SRK (6/8/70) and 1 JB (11/4/70)

We believe the examiner's findings of negligence for the above notices are unsupported by the record. Notice 2 SRK involved an excessive opening in the main contactor compartment of a roof bolting machine, which violated section 305(c) of the Act. The testimony indicates that the machine was inspected and in compliance on the last working day prior to the inspection. The inspector could offer no explanation as to the cause of this violation, other than conjecture that the machine may have been improperly repaired. No evidence was offered by the Bureau that the maintenance and inspection program of the operator was inadequate to insure the

⁴ See 30 CFR Part 100.

machine's maintenance and compliance with the Act.

Notice 1 JB, involved lack of proper supports for the roof, which violates section 302(c) of the Act. The operator has a duty to provide an adequate roof control plan, the materials necessary to comply with the plan, and the supervision of its employees to insure enforcement of the plan. We find nothing in the record indicating that Valley Camp failed to do any of these. The men were instructed on proper safety practices and the foreman inspected the working area earlier on the day of inspection. The Bureau offered nothing to show that the operator's safety classes for the miners or its roof control plan were inadequate, that the foreman's inspections were too infrequent, or that proper materials were unavailable.

Therefore, for Notices No. 2 SRK and 1 JB, we find that the operator was not negligent, and the penalty

for these two violations should be mitigated accordingly.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)) IT IS ORDERED that:

1. The order of the Examiner issued March 10, 1970, IS MODIFIED. The penalty assessed for Notice No. 2 SRK is modified to fifty dollars (\$50), and the penalty assessed for Notice No. 1 JB is modified to two hundred dollars (\$200).

2. Valley Camp Coal Company is to pay, on or before October 31, 1972, the amount of two thousand dollars (\$2,000).

C. E. ROGERS, JR., *Chairman.*

HOWARD J. SCHELLENBERG, JR.,

Alternate Member.

OF INFORMATION

August 18, 1972

**APPEAL OF J. M. HUBER
CORPORATION
AVAILABILITY OF
INFORMATION***

**Administrative Procedure: Public
Information**

The withholding, under 5 U.S.C. § 552 (b) (3), (4) and (9), of the classification of selected oil reservoirs as to their potential for secondary recovery by waterflooding techniques is warranted, where the classification is essentially a "valuation" of mineral property, the disclosure of which is prohibited by an Act of Congress, consists of geological and geophysical information concerning wells, and where such disclosure would, in effect, reveal trade secrets and commercial or financial information.

M-36849

August 18, 1972

**OPINION BY SOLICITOR
OFFICE OF THE SOLICITOR**

In 1970 the Bureau of Mines published a report designated as Information Circular 8455 and entitled "Potential Oil Recovery by Waterflooding Reservoirs Being Produced by Primary Methods." The circular, which was prepared by the staff, Offices of Mineral Resources, Bureau of Mines, presents information pertaining to resource, primary reserve and potential waterflood reserve for 3,209 selected reservoirs, contained in 24 oil-producing States, as of January 1, 1968. Included within the report are a brief narrative history and outlook for

waterflooding for each State and tables showing depth and rate classification (prospect class) of production, resources, and reserves for the selected reservoirs amenable to waterflooding in each State. The names of the reservoirs were not disclosed in the report.

On June 25, 1971, J. M. Huber Corporation of Houston, Texas, wrote to the Chief, Bureau of Mines, Mineral Supply Field Office in Dallas, Texas, that it was desirous of obtaining more detailed information for oil reservoirs located in the Southwest, and requested the names of the reservoirs, initial oil in place, primary reserves, and potential secondary reserves for the better prospects. Huber also requested as general information the average porosity, permeability, and fluid saturations, formation volume factors and viscosities, acre-feet of pay, reservoir rock types, and possible source of supply water for the reservoirs included in the study.

On July 9, 1971 the Chief, Dallas Mineral Supply Field Office, Bureau of Mines, advised Huber by letter that of the information requested only the names of the reservoirs considered could be made available for the reason that the other data were "mostly obtained from private companies on a confidential basis for publication in summary form only." He further stated that "even the reservoir names are on individual sheets of paper which also contain some of the proprietary information; therefore, the person

*Not in Chronological Order.

who copies the reservoir name will have to be unfamiliar with the petroleum industry in a technical sense." The Chief suggested some service such as "Kelly Girl" be employed to secure the reservoir names.

Thereafter, on August 10, 1971, Huber wrote to the Chief, Bureau of Mines, Intermountain Field Operation Center in Denver, Colorado reciting its request to the Chief of the Dallas Mineral Supply Field Office for the physical data and classification of the reservoirs and that officer's refusal to make such information available to it. The letter stated in part that "Huber recognizes and respects the Bureau of Mines position and is making no request for privileged information." Huber requested access to "physical data gathered from public sources and reservoir classifications determined by Bureau of Mines personnel."

In a letter dated August 30, 1971, the Chief of the Intermountain Field Operation Center replied in part that:

I understand from your letter of August 10 to me that Ken Anderson [Chief of the Dallas Mineral Supply Field Office] refused access to these files on the grounds that data collected from public documents is comingled with privileged and confidential information in the same file folder. To give access without first purging them of confidential material is out of the question. To assign technical staff to review the files to sort out confidential data would certainly be nonproductive from our viewpoint, particularly so when we are unable to add to staff and the workload is heavy.

The public information that we used

came almost entirely from the annual publication of the International Oil Scouts. This source, coupled with the names of the reservoirs considered as suggested in Ken Anderson's letter of July 9, should prove helpful to you. The International Oil Scouts' reports can be found in several Houston libraries.

In response to the above letter Huber wrote on September 3, 1971, that in addition to the names of the reservoirs considered in the study it would also like to have the reservoir classifications, which it did not regard as privileged information and would require little, if any, technical staff to gather. Huber offered to employ "Kelly Girl" service to gather the names and classifications, "in order that Bureau of Mines confidential information not be breached."

By letter of September 8, 1971 the Chief, Intermountain Field Operation Center, denied Huber's request for the Bureau's classification of the reservoirs, stating in part:

We cannot give you the individual valuations made on these reservoirs because as we previously told you they are based not only on published information but also on information given to us in confidence by company officials and others who possessed private information. We must respect the conditions under which this information was given.

As an additional grounds for denying access to the classification of the reservoirs by the Bureau, the Chief cited in his letter P.L. 386, sec. 4. (Section 4 of the Act of May 16, 1910 (36 Stat. 369, 370), *as amended* (30 U.S.C. sec. 6)).

Thereafter, pursuant to 43 CFR 2.2, Huber appealed to the Solicitor.

August 18, 1972

By letter of October 13, 1971 Huber agreed with a preliminary analysis of the appeal by the Deputy Solicitor that the only issue on appeal is the availability to Huber of the Bureau of Mines' classification of the reservoirs considered in compiling Information Circular 8455.

The text of Information Circular 8455, on pages 3 and 4, describes the classifications of the reservoirs as follows:

Because some oil accumulations are more amenable to recovery from water-injection operations than others, each selected oil reservoir was classified and tabulated by class. Class definitions are based upon the ratio of estimated additional oil recovery from initiation of water-injection operation to estimated ultimate primary recovery. In each case, estimated recovery is that obtained by the use of present technology under current economic and operating conditions. In this report, reservoir classifications are—

Class 1—Those reservoirs where estimated oil recovery resulting from water injection is more than two-thirds of ultimate primary oil recovery.

Class 2—Those reservoirs where estimated oil recovery resulting from water injection is from one-third to two-thirds of ultimate primary oil recovery.

Class 3—Those reservoirs where estimated oil recovery from water injection is less than one-third of ultimate primary oil recovery.

The evaluation methods utilized by the Bureau of Mines personnel in arriving at the classification of the reservoirs are described on page 4 of Information Circular 8455 as follows:

Bureau of Mines personnel in various field offices selected and classified reservoirs and estimated the oil resources and

reserves. Resource and primary reserve estimates for the selected reservoirs were made from analyses of rate-cumulative and rate-time decline curves, production-reserve ratios, and volumetric calculations. In some instances operators supplied information for specific reservoirs. Whenever data for a specific reservoir were not available, average values for fluid and rock characteristics obtained for reservoirs in the same formation and geographic area were used. Primary recovery factors were derived from data published by Arps and Roberts and Beal.¹ Results obtained from water-injection projects were used for estimating potential waterflood reserves for the selected reservoirs. It was assumed that recovery from water injection in the selected reservoirs would be comparable to results obtained from previously waterflooded reservoirs having similar characteristics.

On page four the authors acknowledge use of information from publications of the American Petroleum Institute, the Interstate Oil Compact Commission, the American Institute of Mining, Metallurgical, and Petroleum Engineers, the International Oil Scouts Association, the Conservation Committee of California Oil Producers, reports by State geological surveys and State oil and gas agencies, and "privileged information supplied by personnel of various oil companies."

¹ The authors and publications referred to are listed on page 23 of the Report as: (a) "Arps, J. J., and T. G. Roberts, The Effect of the Relative Permeability Ratio, the Oil Gravity, and the Solution Gas-Oil Ratio on the Primary Recovery From a Depletion Type Reservoir, Trans. AIME v. 204, 1955 pp. 120-127."

(b) "Beal, Carlton, The Viscosity of Air, Water, Natural Gas, Crude Oil and Its Associated Gases at Oil Field Temperatures and Pressures, Trans. AIME, v. 165, 1946, pp. 94-115."

It is thus clear that the classifications are scientific conclusions by the authors as to the probable degree of oil recovery which might be expected through utilization of the water-injection method of secondary recovery in the selected reservoirs, based upon raw data in published form from various sources or obtained from oil companies. The data obtained from oil companies, which relates to past production, well logs and other geophysical or geological information is not generally available to the public.

Under 5 U.S.C. sec. 552, popularly known as the Public Information Act:

* * * each agency, on request for identifiable records made in accordance with published rules * * * shall make the records promptly available to any person.
* * *

unless the records fall within one of the exceptions stated in subsection (b) of that section.

The third, fourth, and ninth exceptions of subsection (b) read as follows:

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(9) geological and geophysical information and data, including maps, concerning wells.

Section 4 of the Act of May 16, 1910, *as amended* by the Act of February 25, 1913 (37 Stat. 681, 682), 30 U.S.C. sec. 6, provides in pertinent part:

Sec. 4. In conducting inquiries and investigations authorized by this Act neither the director nor any member of the Bureau of Mines shall have any * * * interest in any mine or the products of any mine under investigation, * * * or issue any report as to the valuation or the management of any mine or other private mineral property; * * *.

Section 2. of the Act of May 16, 1910 was amended by this same Act of February 25, 1913 (30 U.S.C. sec. 3) to read in pertinent part:

Sec. 2. That it shall be the province and duty of the Bureau of Mines * * * to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions and increasing safety, efficiency, economic development, and conserving resources through the prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; * * *.

There can be no question that the study reported in Information Circular 8455 was a scientific investigation of a mineral substance undertaken with a view to improving efficiency, economic development, and conservation of the resource and that section 4 of the Act of May 16, 1910, *as amended*, prohibits the issuance of any "report as to the valuation * * * of * * * private mineral property" resulting from the investigation.

Although the term "valuation" is not defined in the Act, I have no difficulty in concluding that classification of the selected reservoirs as good or poor prospects for secondary recovery by water-injection is a valuation as that term is normally

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August 18, 1972

used.² Accordingly, in my judgment, disclosure of the classifications involved is prohibited by statute and, therefore, falls within the third exemption in subsection (b) of 5 U.S.C. sec. 552.

With respect to the fourth and ninth exemptions under 5 U.S.C. sec. 552(b), in *Appeals of Freeport Sulphur Company and Texas Gulf Sulphur Company, Availability of Information, Solicitor's Opinion*, M-36779 (November 17, 1969), which involved the denial of resource value estimates made by the Government of certain tracts of the Outer Continental Shelf adjacent to the State of Louisiana offered for bid for sulphur leases, it was held that the resource value estimates did not come within the fourth or ninth exemptions of 5 U.S.C. sec. 552(b) and that withholding the Government's estimates therefore was unwarranted, even though confidential information consisting of geological and geophysical information and data concerning wells, furnished by lessees of the Government were taken into account in arriving at the estimates. In concluding that the estimated values were not exempt under exemption four of 5 U.S.C. sec. 552(b) we pointed out:

It is my understanding that in formulating the resource value estimates, the Bureau of Land Management and the

Geological Survey made use of confidential information obtained from Government lessees. However, the estimated values attributed to the various tracts were not obtained from persons outside the Government; they were made by employees of the Government.

In other words, the fact that the estimates themselves were generated within Government and not obtained from outside sources placed them outside the scope of the fourth exemption.³ Thus, the reasoning of the Chief, Intermountain Field Operations Center, and Chief, Dallas Mineral Supply Field Office, that Huber must be denied access to the classifications because they are based upon confidential information is not a valid reason, in itself, for withholding the information requested in view of our holding in the *Freeport Sulphur* and *Texas Gulf Sulphur* appeals.

I believe, however, that the reservoir classifications in this case are clearly distinguishable from the resource value estimates involved in the *Freeport Sulphur* and *Texas Gulf Sulphur* cases. The resource value estimates in those cases concerned evaluations relating to areas on the Outer Continental Shelf being leased by the Government as

² A "valuation" is defined in WEBSTER'S NEW INTERNATIONAL DICTIONARY, SECOND ADDITION (UNABRIDGED) as "estimation, usually personal estimation, as of the merit, standing, or character, of something; judgment of value or relative values; * * *"

³ See: *Consumer's Union of U.S., Inc. v. Veterans Administration*, 301 F. Supp. 796 (D.C. N.Y. 1969), wherein the Court held that raw scores, scoring schemes, and quality point scores of hearing aids tested by the Veterans Administration were not information obtained from outside the Government and would not be exempted from disclosure under 5 U.S.C. sec. 552(b)(4). Appeal by plaintiff dismissed as moot by the U.S. Court of Appeals in *Consumers Union of U.S., Inc. v. Veterans Administration*, 436 F.2d 1363 (2d Cir. 1971).

distinguished from resource valuations of areas under private control. Furthermore, in the *Freeport Sulphur* and *Texas Gulf Sulphur* cases the disclosure of the resource value estimates did not reveal "trade secrets and commercial or financial information obtained from a person and privileged or confidential" nor were such estimates "geological and geophysical information and data, including maps, concerning wells." In this case I am advised by the Bureau of Mines that by disclosure of the reservoir classifications of identified reservoirs, individuals knowledgeable in the field could ascertain the upper, lower or both upper and lower potential waterload reserve for each reservoir. This reserve could be translated into dollar value. Also, in some cases, reservoir classifications could be used by individuals knowledgeable in the field to identify cumulative production, primary reserve, potential waterload reserve and remaining oil-in-place. Such information constitutes trade secrets and commercial or financial information. Also, the reservoir classifications in this case are clearly geological evaluations and data concerning wells.

In the circumstances, it is my view that the reservoir classifications for the individual reservoirs studied in connection with Bureau of Mines Information Circular 8455 constitute geological and geophysical information and data concerning wells within the ninth exemption and that disclosure of such classification would, in effect, disclose trade

secrets and commercial or financial information of the oil companies holding an interest in the individual reservoirs within the fourth exemption, and that such classification should not be made available to the appellant and the public.

Mitchell Melich, *Solicitor*.

KENNECOTT COPPER CORPORATION

8 IBLA 21 Decided *October 6, 1972*

Appeal from decision of Anchorage, Alaska, state office, Bureau of Land Management, which rejected trade and manufacturing site purchase application.

Affirmed.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Statutory Construction: Generally

The Act of April 29, 1950, requiring the filing of a notice of location or a purchase application before an occupant of a trade and manufacturing site can be given credit for his occupancy, does not work an unlawful forfeiture of an occupancy right.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Withdrawals and Reservations: Generally

A claimant's occupancy of a trade and manufacturing site prior to a withdrawal does not establish a "valid existing right" excepted by the withdrawal where credit for his occupancy prior to the withdrawal cannot be given under the Act of April 29, 1950, because the claimant did not file a notice of location or purchase application prior to the withdrawal.

Conveyances: Generally—Public Lands: Disposals of: Generally

Private agreements do not control the disposition of federal public land. Rights to federal lands must be gained by compliance with the governing federal public land laws.

Alaska: Generally—Alaska: Possessory Rights—Alaska: Trade and Manufacturing Sites—Conveyances: Generally

Any right under a notice of location required by the Act of April 29, 1950, is personal to the claimant filing the notice. A transferee of the claimant's possessory interest in a trade and manufacturing site cannot claim under his transferor's notice to avoid the effect of a withdrawal where the transferee had not filed his own notice or purchase application prior to the withdrawal.

APPEARANCES: Eugene F. Wiles, Esq., of Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, Alaska, for appellant.

*OPINION BY
MRS. THOMPSON
INTERIOR BOARD OF
LAND APPEALS*

Kennecott Copper Corporation, hereinafter termed Kennecott, has appealed from a decision of the Alaska state office, Bureau of Land Management, dated August, 13, 1970, which rejected its application to purchase a trade and manufacturing site, F-034646, on the Kobuk River, Alaska, for the reason the lands were withdrawn.

Kennecott's application described the same land as that in a notice of location and settlement for a trade and manufacturing site filed by

Thomas A. Packer, on July 6, 1965, and identified the claim by Packer's serial number F-034646. Kennecott also submitted a quit-claim deed dated July 10, 1965, to it from Packer conveying all interest which he had "if any," and all interest which he might thereafter acquire in the land described in the trade and manufacturing site notice of location.

The Bureau's office held that Kennecott did not obtain any rights under the location notice which Packer had filed, and that the land was withdrawn from appropriation and disposition by Public Land Order No. 4582 prior to the time (July 6, 1970), Kennecott filed its application to purchase. Therefore, it rejected the application.

The issues in this case relate to the effect of the withdrawal and the pertinent statutes involved here. Public Land Order No. 4582, 34 F.R. 1025 (January 23, 1969), withdrew:

Subject to valid existing rights * * * all public lands in Alaska * * * from all forms of appropriation and disposition under the public land laws * * * for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska. * * *

Under section 10 of the Act of May 14, 1898, *as amended*, 43 U.S.C. sec. 687a (1970), not more than 80 acres of land in Alaska can be purchased by one:

* * * in the possession of and occupying public lands in * * * Alaska in good faith for the purposes of trade, manufacture, or other productive industry, * * * upon submission of proof that said

area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry. * * *

The Act was amended by section 5 of the Act of April 29, 1950, 43 U.S.C. sec. 687a-1 (1970), requiring a notice of occupancy to be filed in a land office within 90 days from initiation of the claim. It then provides:

* * * Unless such notice is filed in the proper district land office within the time prescribed the claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier. Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

Kennecott never filed a notice of location and its purchase application was filed approximately a year and a half after the withdrawal. Nevertheless, it contends that it has occupied the site since 1965 thereby initiating valid rights under the trade and manufacturing site law which could not be affected by the withdrawal. It contends that the site was excepted by the language of the withdrawal as a "valid existing right." If we assume, *arguendo*, that Kennecott's occupancy of the tract was in compliance with the trade and manufacturing site law, can that occupancy be considered as a "valid, existing right" within the meaning of the withdrawal in light of the language of section 5 of the Act of April 29, 1950, quoted above?

Appellant contends that the Act

of April 29, 1950, does not affect its rights here, and bases this contention on two major arguments. The first argument is an interpretation of the Act of April 29, 1950, so as not to take away any rights a claimant may have had by virtue of occupancy of public land. The second, alternative, argument, is to the effect that Kennecott, by purchasing Packer's possessory interest in the claim, should be allowed to receive credit for Packer's prior location notice and be allowed to purchase the land under such notice.

With respect to the first argument, appellant contends that the interpretation of the Act of April 29, 1950, to deny its application, as reached below, is contrary to previous holdings of this Department. It cites the decision of *James Morris*, 47 L.D. 326 (1920), as upholding the validity of a settlement claim over a withdrawal even though the law in that case, section 3 of the Act of May 14, 1880 (21 Stat. 140, 141), 43 U.S.C. sec. 166 (1970), required a claim to be made of record within a time period, and it allegedly was not. The *Morris* case is distinguishable from our case. In that case, it was determined that the claimant had filed an application within the time required, albeit he withdrew it and filed a different application which the decision stated could have been treated as an amended application. More importantly, however, the terms of the withdrawal and the Act prescribing the recordation of the claim are couched in terms far different

from those in this case. The withdrawal expressly excepted settlement claims, and the Act of May 14, 1880, expressly allowed a homestead settler—

* * * the same time to file his homestead application and perfect his original entry in the United States Land Office as allowed on May 14, 1880, to settlers under the then existing preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under such preemption laws.

In our case, the withdrawal did not expressly except occupancy or settlement rights, but "valid existing rights."¹ The Act of April 29, 1950, enacted thirty years after *Morris*, expressly provides a sanction that no credit will be given for the occupancy "maintained in the claim prior to the filing of (1) a notice of the claim * * *, or (2) an application to purchase, whichever is earlier." In view of these differences, the *Morris* case has no precedential significance. *Of. United States v. Hurlburt*, 72 F.2d 427 (10th Cir. 1934), involving the same language of withdrawal and statutes as in the *Morris* case, emphasizing that unsurveyed land could be withdrawn by the Government although it was occupied by a settler, but that the settler's rights depended upon the language of the withdrawal and his compliance with the law. See also, *Russian-American Packing Co. v. United States*, 199 U.S. 570 (1905), holding that the

United States may withdraw land from entry and sale even though it may defeat an inchoate right of a settler, as the mere occupancy of land does not create a vested right against the United States. As stated by the Court, at 575, "* * * the mere settlement upon public lands without taking same steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States."

Appellant also contends that an interpretation of the Act of April 29, 1950, that prior possessory rights will be lost by the failure to file a location notice or application to purchase, would be contrary to the general rule of law that forfeitures are not favored. It asserts that the legislative history of the Act shows that it was passed merely to provide the Government with information needed in the administration of public lands and was not passed "to work a forfeiture on prior valid possessory rights of claimants."

It is true that the Act of April 29, 1950, as discussed in *Anne V. Hestnes*, A-27096 (June 27, 1955), and *Loran John Whittington and Chester H. Cone*, A-28823 (August 18, 1961), cited by appellant, had the primary purpose of providing this Department with information concerning claims to public lands. Obviously this purpose would not be met if a claimant could present his application to purchase long after a withdrawal had been in effect claiming his occupancy precluded the withdrawal from being

¹ As shown *infra*, even if the withdrawal excepted occupancy or settlement rights, the terms of the Act of April 29, 1950, control.

effective even though he gave no notice to the Bureau, as required. A literal reading and application of the language of the Act of April 29, 1950, comports with the legislative purpose of the Act rather than some forced interpretation which, in effect, would obviate any filing of a notice of location or purchase application prior to a withdrawal of the land.

Furthermore, there is no merit to appellant's contention that the Bureau's interpretation of the Act works an unlawful forfeiture on its "prior valid possessory rights." The Act was passed years before appellant's alleged occupancy of the site began. The provisions of the Act in amending the Trade and Manufacturing Site Act established certain conditions and requirements whereby the United States would recognize occupancy for trade and manufacturing site purposes. The failure of the appellant to meet these conditions brought into operation the consequences of the lack of fulfillment of the condition, *i.e.*, that occupancy prior to the filing of a notice of location or application to purchase could not be considered. See *Albert L. Scepurek*, A-28798 (March 27, 1962). As stated in *Ickes v. Underwood, et al.*, 141 F.2d 546, 548 (D.C. Cir. 1944), "[t]he Government may dispense its bounty on such terms as it sees fit." See also *Lutzenhiser v. Udall*, 432 F.2d 328, 331 (9th Cir. 1970).

The Act of April 29, 1950, is also akin to recording statutes prescrib-

ing statutes of limitations for enforcing rights. Such statutes affecting existing property rights are not considered as working unlawful forfeitures upon the existing rights where they allow time for compliance. They have been upheld as constitutional by the Supreme Court. See, *e.g.*, *Vance v. Vance*, 108 U.S. 514 (1883). See also *John Martin Pearson*, 70 I.D. 523 (1963), denying a protest by a conflicting claimant in Alaska to a headquarters site on the ground the protestant failed to bring a quiet title action in a court of competent jurisdiction as required by section 10 of the Act of May 14, 1898, 30 Stat. 413, 414, and holding that he, therefore, lost whatever rights to the site he might otherwise have had. Compare the requirements of the Scrip Recordation Act of 1955, 69 Stat. 534, 43 U.S.C. sec. 274 note (1970), which provided that existing scrip and selection claims had to be recorded in this Department or they would not be accepted as a basis for the acquisition of land. If the scrip documents are filed after the time prescribed, this Department has followed the Congressional mandate and refused to recognize any rights to public lands thereunder. *M. B. Waldron*, A-28703 (January 31, 1962); *Patricia R. Williams*, A-28160 (February 2, 1960). In *Udall v. Battle Mountain Company*, 385 F.2d 90 (9th Cir. 1967), *cert. denied*, 390 U.S. 957, the Court discussed the Scrip Recordation Act, saying at 96,

October 6, 1972

* * * Congress's principal purpose was to secure information. In the absence of clear expression we cannot conclude that it intended, on the basis of information yet to be disclosed, to obligate itself in any fashion beyond its already existing commitments.

This rationale seems pertinent here.

We conclude that we must follow the mandate expressed in the Act of April 29, 1950, not to give any credit for the occupancy of the appellant prior to the time it filed its purchase application. Therefore, its occupancy of the tract prior to the withdrawal cannot be considered a "valid existing right" excepting the tract from the withdrawal. *Russian-American Packing Co. v. United States*, *supra*.

We must also reject appellant's alternative argument that as the transferee of Packer's possessory interest in the land, it should be allowed to receive credit for Packer's location notice. It cites *Carroll v. Price, et al.*, 81 F. 137 (D. Alas. 1896), as authority for the proposition that possessory rights in federal lands may be conveyed from one person to another. It argues that under that ruling the conveyance included all of the rights to the land including the right to claim the notice of location and settlement. That transfer of possessory interests in federal lands and improvements thereon as between private parties may be made and recognized in court determinations of the possessory rights of such parties between themselves is not questioned. *Carroll v. Price*, however, does not

support any argument that transfers between private parties control the disposition of public land from the United States. They do not. The Supreme Court in *Tarpey v. Madson*, 178 U.S. 215, 221 (1900), has said:

* * * notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. * * *

That opinion goes on to state that rights to federal lands must be gained by compliance with the governing federal laws. Where, as in that case, the law required a declaration of a right under the preemption laws to be filed in a land office, a claimant's mere settlement on land without the filing of such a declaration, was not sufficient to defeat a subsequent grant of the land.

Any right under a notice of location required by the Act of April 29, 1950, is personal to the party filing the notice. In it the claimant must certify, under penalty of law for making false statements, to the truthfulness of the statements made therein. The statements required include information which would show whether a claimant is qualified under the law to acquire the site, such as his citizenship and majority. The notice also asks the date "settlement or occupancy was made by you." Packer's notice of location did not show that the notice was being made in behalf of anyone other than himself. No other person is entitled to any rights under that notice of

location as it was personal to Packer. Therefore, Kennecott can claim no rights by virtue of Packer's notice.²

We note that a notice of location is not by itself sufficient to except land from a withdrawal, as it is the act of occupancy under the pertinent law which creates the rights. *Vernard E. Jones*, 76 I.D. 133, 136 (1969). Since, however, as ruled above, Kennecott's occupancy of the tract prior to the filing of its purchase application may not be considered, it was proper to reject its application filed when the land was withdrawn.³

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1972), the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

EDWARD W. STUEBING, *Member*.

FREDERICK FISHMAN, *Member*.

² This ruling pertains to transferees and assignees of a claim, but is not to be considered as a ruling on the rights of the heirs of an entryman.

³ We note further that the plat of the trade and manufacturing site submitted by appellant in support of its application to purchase depicts an area within the site identified as "Native Cemetery." Public Land Order No. 2171, dated August 3, 1960 (25 F.R. 7533), withdrew public lands used for native cemeteries from appropriation under the public land laws. The extent of any such conflict may not be determined from the record, and need not in view of our conclusion reached above. However, such a determination would be necessary before any disposal of the land could be made. The Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, terminated Public Land Order No. 4582, as modified, but does not affect our disposition of this purchase application.

APPLICABILITY OF THE MINERAL LEASING ACT TO DEPOSITS OF BENTONITE

Mineral Leasing Act: Applicability

Where there is no determination that bentonite is a silicate of sodium or any other mineral subject to the Mineral Leasing Act, *as amended* and supplemented (30 U.S.C. secs. 181-287), bentonite will not be made subject to that statute but will continue to be subject to disposition under the statute to which it has hitherto been subject.

Mining Claims: Generally

Any mineral deposit subject to location under the Mining Law (30 U.S.C. secs. 21-54) will continue to be subject to disposition under that statute until that statute is amended or the deposit is made subject to disposition under some other statute. A determination that a mineral, previously locatable, is leasable will not affect the validity of claims located for that mineral when it was legally locatable.

M-36866

November 7, 1972.

BRANCH OF MINERALS

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: APPLICABILITY OF THE MINERAL LEASING ACT TO DEPOSITS OF BENTONITE.

The question of whether bentonite is a mineral subject to the Mineral Leasing Act of February 25, 1920, *as amended* and supplemented (30 U.S.C. secs. 181-287), has been before this office for a considerable period. No one has suggested that all bentonite is leasable under the existing statute, but it has been suggested that bentonites may be

November 7, 1972

divided into calcium bentonites and sodium bentonites. Sections 23 and 24 of the Mineral Leasing Act, *as amended* (30 U.S.C. secs. 261-262), provide for the issuance of prospecting permits and leases for "chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium." The question before this office has revolved around the possibility that some bentonite may be a silicate of sodium. Whether or not any bentonite is a silicate of sodium is a technical question and outside the scope of this office's competence. If the technical experts of the Geological Survey determine that bentonite of an identifiable type is a silicate of sodium, the legal question could be easily solved. Such bentonite would be leasable.

However, there has not been such a determination by the Geological Survey. The memorandum of November 11, 1971, from the Acting Director, Geological Survey, indicates a possibility that some bentonite may contain a silicate of sodium. That memorandum explores possibilities instead of making positive statements. It is evident from the memorandum that the Survey has not yet determined that any particular type of bentonite is a silicate of sodium. However, it is recognized that some bentonite does contain sodium, and possible methods for determining whether any particular bentonite is a silicate of sodium are described. I interpret this memorandum as saying that it is possible that at some future date

some bentonites may be determined to be silicates of sodium, but I do not find in the memorandum such a positive statement that any particular bentonite is a silicate of sodium as to support a determination by the Solicitor's Office that that particular bentonite is leasable under sections 23 and 24. It would be highly inappropriate for this office to essay the role of mineralogists and to attempt to determine whether some bentonite is a silicate of sodium.

The history of the nation's mineral laws may be succinctly stated. All minerals (*i.e.*, all substances popularly recognized as minerals, but not such substances as water which, although technically a mineral, is not popularly recognized as one) were originally subject to the general mining law of 1872 (30 U.S.C. secs. 21-54). From time to time various minerals have been removed from the scope of that statute and put under other statutes. A major excision from the mining law was the Mineral Leasing Act of February 25, 1920, which removed coal, phosphate, oil, gas, oil shale, and sodium from the mining law. Whether a mineral has been removed from the mining law depends upon the terms of the amendatory statute, and it is my opinion that the Department is required to treat any mineral as subject to the mining law until it has been determined to have been excluded from the scope of that statute and placed under some other statute. Following that principle, I conclude that bentonite

must still be regarded as not subject to disposition under the Mineral Leasing Act. If at some future time technical experts in the Department determine that bentonite (or some type of bentonite) is a silicate of sodium, a different legal conclusion will probably be reached. Meanwhile bentonite should continue to be subject to disposition under the same laws as in the past.

A mining claim, which is validly located for bentonite at a time when that mineral is locatable, would continue to be valid as long as the mining claimant maintained it in compliance with the law. Having been property in the highest sense of the word, an existing claim should not be nullified because of a new interpretation of law by the Department. See *Franco Western Oil Company, et al.* (Supp.), 65 I.D. 427 (1958), and the cases cited in that decision.

However, although mining claims located for bentonite at any time before a new departmental interpretation is issued would be protected, it would be appropriate to encourage bentonite claimants to seek patents in order to remove all doubt as to their claims' validity.

FREDERICK N. FERGUSON,
Assistant Solicitor.

APPEAL OF GRANITE CONSTRUCTION COMPANY

IBCA-947-1-72

Decided November 13, 1972

Appeal from Contract No. 14-06-D-6993, Specifications No. DC-6805,

Westlands Water District Distribution System, Laterals 29, 30 and 31, San Luis Unit, Central Valley Project, Bureau of Reclamation.

Dismissed.

Rules of Practice: Appeals: Dismissal—Contracts: Performance or Default: Suspension of Work—Contracts: Disputes and Remedies: Jurisdiction—Appropriations

A claim asserted under the Suspension of Work clause for costs arising out of a delay in performance of a construction contract caused by the exhaustion of available funds following the Government's failure to appropriate additional moneys necessary to enable a contractor to complete the work prior to the time established by the contract and the President's subsequent impounding of such funds, which resulted in the contractor's election to stop work, was dismissed as being outside the Board's jurisdiction since the contract provided that the Government's liability for work costing in excess of a specified amount reserved and available for payment was contingent upon further appropriations and reservation, and the President's action was a sovereign act taken to halt inflation, neither of which is considered to be a stoppage by actual or constructive direction of the contracting officer in the administration of the contract within the meaning of the Suspension of Work clause.

APPEARANCES: For the Appellant, Mr. Harold F. Blasky, Attorney at Law, Greenberg, Trayman, Harris, Cantor, Reiss & Blasky, Washington, D.C.; for the Government, Mr. John B. Little, Jr., Department Counsel, Denver, Colorado.

November 13, 1972

OPINION BY MR. KIMBALL INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss this appeal as sounding in breach of contract and being outside the Board's jurisdiction. The appeal involves a claim for costs in the amount of \$119,207.82 which the appellant allegedly incurred as a result of a delay in performance arising out of the Government's failure to timely appropriate and then to make available all the funds necessary to enable it to carry on the work in accordance with its accelerated schedule. When the available funds were exhausted, the appellant stopped construction. Relief is sought under the Suspension of Work clause¹ on the ground that a constructive suspension occurred.

¹ Clause 4A, supplement to General Provisions (Standard Form 23A, June 1964 Edition), Exhibit 1, which reads in pertinent part:

"4A. SUSPENSION OF WORK

"(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

"(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable ad-

The Government, however, maintains that the Suspension of Work clause is inapplicable. In its view, a contractor is entitled to an adjustment under that clause only if performance is suspended, delayed, or interrupted by an act of the contracting officer in the administration of the contract. The Government asserts that performance here was suspended by act of the contractor, not the contracting officer, when funds were no longer available. It contends that the matter is governed by par. 12 (entitled Funds Available for Earnings), section b. of which expressly provides, *inter alia*, that "the Government shall not be liable for damages * * * on account of delays in payments due to lack of funds." The Government's position is that, in any event, the suspension of work occurred as a result of action taken in its sovereign capacity for which it is not accountable.

The parties appear to be in essential agreement on the facts. The contract, in the amount of \$6,228,165.23, was awarded to the appellant on May 14, 1970, at which time the notice to proceed was issued and received. Under par. 14 of the specifications the work was to be completed 540 calendar days thereafter, on November 5, 1971. The appellant, however, by letter dated June 9, 1970, submitted a construction pro-

justment is provided for or excluded under any other provision of this contract. * * *

All exhibits referred to are contained in the appeal file. It is noted that the legend "Gov't. Exhibit" has been incorrectly stamped on each exhibit. The word "Gov't." is deemed expunged from all such designations.

gram calling for earlier completion, on December 31, 1970.² Approval of the construction program, with modifications, was given by letter dated July 17, 1970.³

By virtue of section a. of par. 12, the appellant was put on notice from the outset that the sum of \$400,000 had been reserved and was available for payments to it to cover earnings during fiscal year 1970. The Government on June 30, 1970, advised appellant that an additional amount—\$716,683—had also been provided for, making a total of \$1,116,683 available for payment to it for the work to be performed. The Government letter concluded as follows:

In accordance with the terms of your * * * contract, it is to be expressly understood that the Government has no obligation to provide funds in addition to those reserved in writing.⁴

Subsequently, by letter dated July 15, 1970, the appellant was notified that the budget request submitted to Congress by the President included an amount of \$3,870,000 for earnings under this contract during fiscal year 1971, but that the Public Works Appropriation Act for the 1971 fiscal year, in which it was contained, had not as yet become law. In closing the contractor was expressly "cautioned that the prosecution of the work at a rate in excess of the rate provided for in

the budget request will be at his own risk."⁵

In reply, the appellant expressed its concern that "the funds available for earnings * * * will be exhausted by mid-October."⁶ It pointed out that even if the Public Works Appropriation Act for fiscal year 1971 were adopted, there would be sufficient funds reserved for only about 80 percent of the contract price. Appellant requested that additional funds be reserved.

The Government's response read:

We are unable to provide assurance of any additional funds at this time. Your operations should be guided by Paragraph 12 of the specifications and our letter of July 15, 1970, on the Funds Available for Earnings.⁷

The matter reached culmination in the fall of 1970. By letter dated October 15, the appellant gave notice, as required by par. 12 that "existing fund reservations will be exhausted within the next thirty days."⁸ Once again the contractor requested that additional funds be made available.

The Government's reply advised that the Appropriations Act had passed and that, including the budget amount provided therein, a total of \$4,986,683 was reserved under the contract.⁹ It pointed out

² Exhibit 6. Subsequent revisions to the program by letters dated July 7 and July 30, 1970 (Exhibits 8 and 12) have no bearing on the dispute.

³ Exhibit 10.

⁴ Exhibit 7. The conclusion of the letter is based upon the third sentence of par. 12(e). Par. 12 in its entirety is set out as Appendix A, *infra*.

⁵ Exhibit 9. A similar letter, with the same concluding paragraph, which indicated that the President's budget request for this contract for fiscal year 1972 was in the amount of \$811,529, is dated July 20, 1971 (Exhibit 32).

⁶ Exhibit 11, dated July 20, 1970.

⁷ Exhibit 13, dated July 30, 1970.

⁸ Exhibit 16. The portion of par. 12 referred to is the first sentence of Section e. (see Appendix A.)

⁹ Exhibit 17, dated October 27, 1970.

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that as of October 20, 1970, the contractor's estimated earnings amounted to \$4,533,246.17, which left a balance of \$453,436.83 available for subsequent payment. The letter concluded:

* * * Based on your present rate of progress, it is apparent that the available funds will be exhausted before the end of Fiscal Year 1971.

Accordingly, as provided for in Paragraph 12 * * *, work may be suspended by you, or if you elect, you may continue work and/or delivery of materials under * * * the contract * * *. It is understood, however, that no payment will be made for such work or materials unless and until sufficient additional funds have been provided by Congress.

By letter dated November 6, 1970,¹⁰ the contractor advised that it intended to suspend all work on the project since the funds available were "nearly exhausted." It specifically "reserved" all of its applicable rights under the contract. After a further exchange of correspondence in which the contractor stated that it would furnish a breakdown of additional costs as soon as such were determined, the Government advised appellant to "review Paragraph 12 * * *, which prescribes contractor and Government responsibilities under these circumstances."¹¹ On January 11, 1971, the Government noted that the appellant's "estimate of earnings anticipated to June 30, 1971," exceeded the amount reserved.¹²

In the meantime the appellant received word that the Congress had

actually appropriated more funds than the President had requested for various Bureau of Reclamation projects, including the Westlands Water District Distribution System, San Luis Unit. However, the appellant was advised, the President had impounded or placed in budgetary reserve those funds that the Congress had added.¹³ Consequently, by letter dated May 26, 1971, the appellant took the position that additional funding was in fact available and that the withholding of such funds constituted a suspension of work compensable under that clause of the contract.¹⁴

The contention was not denied. The Government merely advised that the amount reserved for payment under the contract was increased by \$356,814 to \$5,416,637, but that appellant's estimate of earnings anticipated to June 30, 1971, exceeded it.¹⁵ In the Govern-

¹⁰ Letter to appellant, dated January 7, 1971, from Hon. Charles S. Gubser, Member of Congress, enclosing a letter to Mr. Gubser from the Executive Office of the President, Office of Management and Budget, dated December 29, 1970, attached to appellant's notice of appeal (Exhibit 40). According to Exhibit 38, Congress increased the budget request for the San Luis Unit by \$10 million. Attached to Exhibit 38 is a tabulation comparing Congressional actions with Bureau of the Budget allowances for the Bureau of Reclamation for fiscal year 1971. Footnote 9 thereof appears to indicate that the \$10 million added was earmarked for new contracts. Department counsel's position is that this money was, therefore, unavailable to pay earnings under existing contracts (Memorandum Brief in Support of Motion to Dismiss, 10-11).

¹¹ Exhibit 27. The letter from the Executive Office of the President, dated December 29, 1970, note 13, *supra*, was attached.

¹² Exhibit 29, dated June 4, 1971. The amount reserved had previously been increased by \$73,140 to \$5,059,823 (Exhibit 24).

¹³ Exhibit 18.

¹⁴ Exhibit 23, dated December 28, 1970.

¹⁵ Exhibit 24. See note 9, *supra*.

ment's view, funding continued to be in a state of exhaustion.

Funds became available again after July 1, 1971. The appellant accordingly requested an extension of time for completion of the work of 244 calendar days covering the period from October 29, 1970, through July 1, 1971, when performance was either partially or wholly suspended.¹⁶ The extension of time was granted in its entirety¹⁷ and is not in issue.

Thereafter, by letter dated October 18, 1971, the appellant submitted the details of its claim, amounting to \$119,207.82, for additional costs incurred as a result of the work stoppage, which it had previously mentioned.¹⁸ The contracting officer denied the claim.¹⁹ He held that the cessation of work did not amount to a constructive suspension under the Suspension of Work Clause, but was a stoppage at the contractor's option under par. 12, due to the exhaustion of funds. In his view the matter involved an alleged breach of contract.

The appellant appealed from the decision by Notice of Appeal dated December 30, 1971.²⁰ In it appellant asserted that funds had in fact been available but "were withheld by an act of the President in an attempt to control the economy of the United States." For this reason appellant subsequently maintained in its complaint (dated January 24, 1972) that par. 12 was improperly invoked and is therefore not a defense to the

claim. In addition, the appellant contends that the Government's approval of the project schedule showing an earlier completion date than was contemplated under the contract constituted a promise by the Government not to interfere with such performance, which the Government breached when the funds necessary for orderly performance were not made available.

Decision

The issue before us is the applicability of the standard Suspension of Work clause where completion at a date earlier than provided for in the contract was authorized by the Government but was delayed as a result of funding problems. The appellant claims that two acts of the Government caused the delay. First, the Government is said to have failed to appropriate sufficient funds to enable appellant to proceed as planned. Then, after funds were available, they were allegedly withheld "by an act of the President to control the inflationary spiral," delaying progress further. Appellant contends that it incurred certain costs as a result of the delay which are recoverable under the Suspension of Work clause.

The Government has relied on the provisions of par. 12 and contends that the Suspension of Work clause is not applicable to a stoppage arising out of these circumstances. In defense of the withholding of appropriated funds, the Government has invoked the "sovereign acts" doctrine.

¹⁶ Exhibit 33, dated July 20, 1971.

¹⁷ Exhibit 3, dated August 11, 1971.

¹⁸ Exhibit 34.

¹⁹ Exhibit 4, dated December 20, 1971.

²⁰ Exhibit 40.

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The appellant, however, interprets the Suspension of Work clause broadly and maintains that its promulgation constituted a blanket waiver of sovereign immunity. It also takes the position that the inclusion of the Suspension of Work clause in the standard contract effected an invalidation or overriding of such provisions as par. 12 which denigrate the comprehensive assumption of responsibility for delay undertaken by the Government. With respect to the President's impounding of funds, appellant asserts in its complaint that par. 12 does not apply.

We are unable to ascribe to the Suspension of Work clause the broad sweep attributed to it by the appellant. Consequently, for the reasons hereinafter mentioned, we grant the Government's motion and dismiss the appeal.

The Board does not consider that the inclusion of the Suspension of Work clause in the contract had the effect of invalidating par. 12. Contract terms may not be lightly disregarded. We find the two provisions to be reconcilable, but even if there were some inconsistency between them, it is a basic principle of construction that an interpretation which gives reasonable effect to all provisions is preferred to one that leaves part of the contract language meaningless.²¹

The possibility that applicability of the Suspension of Work clause might be restricted by another provision of the contract, such as par. 12, is clear from a reading of 4A. Paragraph (b) thereof expressly provides that "no adjustment shall be made under this clause for any suspension, delay, or interruption * * * for which an equitable adjustment is provided for or *excluded under any other provision of this contract.*" Thus, there is in the Suspension of Work clause a recognition that limitations were imposable upon its scope.

Par. 12, moreover, is not the ordinary type of exculpatory clause drafted by a procuring agency to reduce the impact of a standard clause which the Court of Claims has narrowly construed or disregarded entirely.²² It was incorporated into the specifications by statutory authorization (43 U.S.C. sec. 388), specifically cited therein. Set out in section (b) of the provision is a fundamental principle of Government procurement law, viz., "the liability of the United States is contingent upon the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder." A clause of this significance may be ignored by a contractor only at its peril.

The Suspension of Work clause is quite specific in its phraseology.

²¹ *Edward R. Bacon Company*, IBCA-646-5-67 (February 20, 1968), 68-1 BCA par. 6867, at 31,749; *Blake Construction Company, Inc.*, GSBCA No. 2477 (May 17, 1971), 71-1 BCA par. 8870.

²² E.g., *Samuel W. Poorvu v. United States*, 190 Ct. Cl. 640, 652 (1970); *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 685-86 (1968).

It becomes operable, under paragraph (b) thereof, if performance is suspended, delayed, or interrupted by an act of the contracting officer in the administration of the contract or by his failure to act within the time specified therein. Unlike Clause 5 (Termination for Default—Damages for Delay—Time Extensions) of the General Provisions which speaks of “acts of the Government in either its sovereign or contractual capacity,” there is no broad reference in clause 4A to acts of the Government. To put 4A into play there must be an act or a failure to act of the contracting officer which affected performance. Nowhere in the record before us is there any indication or allegation that the contracting officer issued any directive suspending, delaying, or interrupting work. On the contrary, the stoppage of work clearly occurred at the contractor’s initiative, pursuant to par. 12.

The inaction of the Congress in appropriating funds cannot be regarded as an act of the contracting officer.²³ Even if it could be so construed, however, the appellant was specifically put on notice by par. 12 that a development of this nature might occur. The contractor was told in section (b) that the Government would “not be liable for damages * * * on account of delays in payments due to lack of funds.” In section (e) the contractor was told

that “the Government has no obligation to provide funds in addition to those reserved in writing.” That provision “also cautioned” the contractor “that the prosecution of the work at a rate that will exhaust the funds reserved before the end of the fiscal year will be at his own risk.” The appellant was thus forewarned of what came to pass. The inclusion of a Suspension of Work clause in the contract did not eliminate or reduce that risk. It is well settled that the presence of such a clause in a contract does not mean that *all* of the risk incident to any delay encountered on a project not due to the contractor’s fault has been assumed by the Government.²⁴

The problems relating to funding were clearly a contingency which from a reading of par. 12 the appellant should have been aware of and considered at the time it became involved in this project. A situation which is within the contemplation of the parties when a contract is entered into is excluded from the operation of the Suspension of Work clause.²⁵ To the extent that the appellant’s performance schedule was delayed as a result of Congressional inaction, the clause, then, affords no relief.²⁶

For the same reason, the Government’s approval of appellant’s earlier completion date is not

²⁴ *John A. Johnson & Sons v. United States*, 180 Ct. Cl. 969, 985 (1967).

²⁵ *McBride and Wachtel, Government Contracts*, Sec. 28.90[3] (1969).

²⁶ *John F. Burke Engineering & Construction*, ASBCA No. 8182 (March 29, 1963), 1963 BCA par. 3713, at 18,561-63. See *Winston Bros.*, note 23, *supra*.

²³ Cf. *Congress Construction Corporation v. United States*, 161 Ct. Cl. 50 (1963), cert. denied, 375 U.S. 817 (1963); *Winston Bros. Company v. United States*, 131 Ct. Cl. 245 (1955).

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determinative. When the contractor proposed an earlier completion date, it did so knowing full well the funding restrictions imposed by par. 12. Moreover, approval of the performance schedule did not cause a modification of par. 12; it was not within the contracting officer's authority to agree to such a modification.²⁷

The Government did not require accelerated performance. The contractor, on its own, proposed to perform all the work sooner than provided for by the contract, as was its right, and the Government was under an implied obligation not to hinder such performance.²⁸ In our view, however, something far more overt than a failure by Congress to appropriate the funds necessary to enable the appellant to carry on as projected is necessary to constitute an interference with early completion of the work for which the Government can be held responsible.²⁹

The act of the President in with-

holding the funds that Congress did eventually appropriate, which was not covered by par. 12, also did not constitute such a hindrance. His power to impound funds has been questioned, but Presidents have been exercising such authority since the Jefferson Administration.³⁰ Here the appellant has asserted that the President took this step as part of his overall plan to halt national inflation, and there is no evidence to the contrary in the record. It was thus "a 'public and general' act for the 'general good' issued in the exercise of the sovereign power of the United States" for which the Government is not liable.³¹ It was clearly not an act attributable to the contracting officer for which relief is available under the Suspension of Work clause.³²

²⁷ John F. Burke, note 26, *supra*. See *Congress Construction*, note 23, *supra*, at 58.

²⁸ The Government has no duty, however, to make a contractor's performance easier nor can a contractor compel the Government to aid it in finishing ahead of schedule. *Liles Construction Company, Inc.*, ASBCA No. 11966 (May 31, 1968), 68-1 BCA par. 7067, at 32,668.

²⁹ See *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 196 (1965). See also Spidel, *Implied Duties of Cooperation and the Defense of Sovereign Acts in Government Contracts*, 51 Geo. L.J. 516, 518, 2 Y.B. 753, 755 (1963), in which the author said:

"The apparent result of [the] doctrine of 'dual capacity' is that the United States as a contractor has an implied duty of cooperation, but the United States as a 'sovereign' does not. Thus, only part of the United States 'comes down from its position of sovereignty, and enters the domain of commerce' and that part will be liable only for 'improper' acts of prevention or hindrance."³⁰

³⁰ See H.R. Rep. No. 92-1456, 92d Cong., 2d Sess. 19 (1972); 118 Cong. Rec. S. 17246 (daily ed. October 9, 1972); 118 Cong. Rec. H. 9349 (daily ed. October 10, 1972); 118 Cong. Rec. S. 18513 (daily ed. October 17, 1972); N.Y. Times, October 20, 1972, p. 1, col. 1, in which the question of the President's right to withhold appropriated funds was discussed in connection with the recent proposal to place a ceiling on Federal spending of \$250 billion. According to the Times, the question of the President's power to impound "has never been litigated" but "some cases are pending now as a result of an earlier action taken . . . impounding some funds for highway construction."

³¹ *Wunderlich Contracting Co.*, note 29, *supra*; *Anthony P. Miller, Inc. v. United States*, 161 Ct. Cl. 455, 472 (1963), cert. denied, 375 U.S. 879 (1963).

³² *Hydro-Space Systems Corporation*, ASBCA No. 15275 (February 19, 1971), 71-1 BCA par. 8739; *E. V. Lane Corporation*, ASBCA Nos. 9741, 9920 and 9933 (March 24, 1966), 66-1 BCA par. 5472, at 25,640. See *Congress Construction*, note 23, *supra*. The case of *Empire Gas Engineering Co.*, ASBCA No. 7190 (March 15, 1962), 1962 BCA par. 3323, on which the appellant has relied is clearly distinguishable. There the contracting officer

Appellant's claim is not redressable under the contract. In the absence of a provision affording cognizable relief, the Board has no jurisdiction over this appeal.

Conclusion

The appeal is dismissed.

SHERMAN P. KIMBALL, *Member*.

I CONCUR:

WILLIAM F. MCGRAW, *Chairman*.

Appendix A

"12. FUNDS AVAILABLE FOR EARNINGS

Pursuant to section 12 of the Reclamation Project Act of 1939 (43 U.S.C. sec. 388), funds for earnings under this contract will be made available as provided in this paragraph.

a. The sum of \$400,000 has been reserved and is available for payments to the contractor to cover earnings during fiscal year 1970 under the schedule items, materials delivered to the site, and all other earnings which may be due under the contract, or any contract adjustments thereunder, including retained percentages and liquidated damages: Provided however, That if more than one contract is awarded under these specifications, or if award is made on less than a total of all schedules, the Govern-

ment reserves the right to apportion to the several contracts such amounts out of the total reservation as in the judgment of the contracting officer will constitute a proper apportionment. The contractor will be notified of the amount so apportioned.

b. As to any work which may be done in excess of the amount for which funds have been reserved under the provisions of this paragraph, the liability of the United States is contingent upon the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder. Further, the Government shall not be liable for damages under this contract on account of delays in payments due to lack of funds.

c. If at any time the contracting officer finds that the balance of this reservation is in excess of the estimated amount required to meet all payments due and to become due the contractor because of work performed or to be performed prior to July 1, 1970, the right is reserved to reduce said reservation by the amount of such excess. The contractor will be notified in writing of any such reduction.

d. If the rate of progress of the work is such that the contracting officer finds that the balance of the reservation is less than the estimated amount required to meet all payments due and to become due because of work performed prior to July 1, 1970, the Government may reserve additional funds for payments un-

specifically ordered the contractor to suspend work and the Suspension of Work clause did not limit recovery to acts of the contracting officer "in the administration of the contract."

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der this contract if there are funds available for such purpose. The contractor will be notified in writing of such additional reservation.

e. Should it become apparent to the contractor that existing fund reservations will be exhausted within the next 30 days, the contractor shall at that time give written notice thereof to the contracting officer. If additional funds can be made available, the contracting officer may issue an additional fund reservation as provided for in Subparagraph d. hereof. It is expressly understood, however, that the Government has no obligation to provide funds in addition to those reserved in writing. The contractor is also cautioned that the prosecution of the work at a rate that will exhaust the funds reserved before the end of the fiscal year will be at his own risk. If additional funds cannot be made available, the contracting officer will give written notice thereof to the contractor. If at any time funds are being made available by appropriations for interim periods prior to the enactment of an Appropriation Act, the contractor will be so advised in writing in which case the other notice requirements of this subparagraph will not apply.

If the contractor so elects, he may continue work under the conditions and restrictions of the specifications after funds have been exhausted, so long as there are funds for inspection and supervision, concerning which he will be notified in writing. No payment will be made for any

work done after funds have been exhausted unless and until sufficient additional funds have been provided by the Congress. When funds again become available, the contractor will be notified in writing as to the amount thereof reserved for payments under this contract. The amount so reserved shall be subject to decrease or increase in a manner similar to that provided in Subparagraphs c. and d. hereof. However, if the contractor so elects, the work may be suspended when the available funds have been exhausted. Should work be thus suspended, additional time for completion will be allowed equal to the period during which the work is necessarily so suspended.

f. The procedure above described in this paragraph shall be repeated as often as necessary on account of exhaustion of available funds and the necessity of awaiting the appropriation of additional funds by Congress.

g. Should Congress fail to provide the expected additional funds during its regular session, the contract may, at the option of the contractor, by written notice, be terminated and considered to be completed without prejudice to him or liability to the Government at any time subsequent to 30 days after payments are discontinued, or subsequent to 30 days after passage of the Act which would ordinarily carry an appropriation for continuing the work, or after adjournment of the Congress which failed to make the necessary appropriations."

November 10, 1971

CLINCHFIELD COAL COMPANY***1 IBMA 70a**Decided *November 10, 1971*

Interlocutory appeal by Clinchfield Coal Company from a ruling by Chief Hearing Examiner Ernest F. Horn denying Clinchfield's motion to suppress evidence in a proceeding under the Federal Coal Mine Health and Safety Act of 1969 on the ground that such evidence was the product of an unreasonable search in violation of the Fourth Amendment of the U.S. Constitution.

Ruling affirmed.

Federal Coal Mine Health and Safety Act of 1969: Inspections and Investigations—Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

Evidence obtained as a result of an inspection conducted under the authority of sec. 103 of the Federal Coal Mine Health and Safety Act of 1969, without the consent of the operator and without a search warrant, is admissible in an administrative proceeding.

APPEARANCES: Wesley C. Marsh, Esquire, for appellant, Clinchfield Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Stanley M. Schwartz, Trial Attorney, for appellee, U.S. Bureau of Mines.

**MEMORANDUM OPINION IN-
TERIOR BOARD OF MINE
OPERATIONS APPEALS**

This case comes to the Board upon certification by the Chief Hearing Examiner of his ruling is-

*Not in Chronological Order.

sued October 1, 1971, denying a motion by Clinchfield Coal Company (Clinchfield) to suppress evidence in the above proceeding. Clinchfield's motion was based upon its contention that evidence obtained during an inspection of its mine was obtained unlawfully in that it had not consented to the inspection, that no search warrant had been obtained, and that, therefore, the inspection constituted a "search" in violation of the Fourth Amendment. A statement of the case and the facts surrounding the inspection are set forth in the Examiner's ruling and need not be restated here. Timely briefs were filed by both Clinchfield and the Bureau of Mines (Bureau) and oral argument was held before the Board on October 28, 1971.

QUESTION PRESENTED

The question presented to the Board is whether evidence offered in a hearing conducted pursuant to sec. 105(a) of the Act¹ should be suppressed when such evidence was obtained during an inspection of a coal mine conducted without the consent of the operator and without a warrant.

RULING OF THE BOARD

We hold that the inspection of the mine was conducted in a lawful manner pursuant to the Act and that therefore the evidence obtained

¹ All references herein to "the Act" are to the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173, 83 Stat. 742 (1969), 30 U.S.C. secs. 801-960 (1971).

by the inspector should not be suppressed.

As we understand it, the main thrust of Clinchfield's contention is that the Congress intended that all inspections conducted pursuant to the Act must be conducted either with the consent of the operator or, in the absence of such consent, with the authority of a search warrant. In support of its view, Clinchfield argues that neither the Act nor the regulations issued pursuant thereto contain adequate guidelines governing inspections and that therefore the Congress must have intended that the proscriptions of the Fourth Amendment apply. In taking this view, Clinchfield relies heavily on *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970). Clinchfield particularly takes issue with the Examiner's statement that "to grant Clinchfield's motion to suppress would be to hold that the inspection provisions of sec. 103 of the Act are unconstitutional."

Although Clinchfield appears to agree that neither the Examiner nor this Board has jurisdiction to rule on the constitutionality of the Act, it urges upon us that it is unnecessary to reach any question of constitutionality if we accept its view of the legislative intent of the Act. Our trouble with this is that we cannot accept Clinchfield's interpretation. While we think it may be possible to construe the Act in such a way as to avoid a constitutional issue, our examination of the legislative history and the plain, clear language of the Act itself, lead

us to the conclusion that the Congress intended that these inspections be conducted without the necessity of obtaining consent or the securing of a search warrant.

Clinchfield does not contend that there was anything unusual about the inspection in this case and as we understand it, does not allege that it was in any way unreasonable except that express consent of the operator was not obtained and no search warrant had been issued. As a matter of fact, it has been recognized long before passage of the 1969 Act that authorized representatives of the Secretary have a right of entry to coal mines for purposes of determining whether or not the conditions in the mine were in compliance with Federal law and regulations issued pursuant thereto.

There is no issue before us as to whether inspections made pursuant to sec. 103 of the Act constitute a "search" within the meaning of the Fourth Amendment and we make no ruling, nor base our decision herein, on distinctions between administrative inspections and "searches" within the usual context of the Fourth Amendment.² However, even if it were determined that inspections made pursuant to sec. 103 of the Act are "searches" it would not alter our decision.

Section 108 of the Act provides that the Secretary may institute a civil action for relief, including a permanent injunction, whenever an operator refuses to admit an authorized representative of the Sec-

² See *Wyman v. James*, 400 U.S. 309 (1971).

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retary to the mine, or refuses to permit the inspection of the mine. We believe that the provision for this type of injunctive relief indicates clearly that the Congress did not intend to require the Secretary to obtain search warrants in order to carry out inspections of coal mines. The interpretation urged upon us by Clinchfield would, we believe, be entirely inconsistent with this section of the Act.

THEREFORE, the ruling of the Chief Hearing Examiner is hereby **AFFIRMED**.

C. E. ROGERS, Jr., *Chairman*.
DAVID DOANE, *Member*.

**ROBERT G. LAWSON COAL
COMPANY***

1 IBMA 115

Decided May 11, 1972

This is an appeal by the Robert G. Lawson Coal Company (hereinafter "Lawson") from a decision of Alfred P. Whittaker, Departmental Hearing Examiner, assessing civil penalties in the total amount of \$6,575 pursuant to the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the "Act")¹ for 21 violations issued during inspections of Lawson's Number 3 Mine on July 27, 28, 29 and August 28, 1970.

Examiner's Decision **MODIFIED**.

*Not in Chronological Order.

¹ 83 Stat. 742-804; 30 U.S.C. §§ 801-960 (1970).

**Federal Coal Mine Health and Safety
Act of 1969: Penalties: Reasonableness**

Where, numerous violations are found and cited, the aggregate amount of the proposed assessment may be unreasonable for no other reason than that the amount is beyond the operator's ability to pay.

**Federal Coal Mine Health and Safety
Act of 1969: Penalties: Criteria**

In applying the criteria of sec. 109, it is error when considering the operator's history of past violations for an Examiner to take into account the operator's failure to abate a violation within the time set in the Notice of Violation.

**Federal Coal Mine Health and Safety
Act of 1969: Penalties: Criteria**

In applying the criteria of sec. 109 of the Act, it is error for an Examiner to conclude that the operator demonstrated a lack of good faith as to each violation solely on the basis that the violation was not abated within the time set in the original Notice of Violation.

**Federal Coal Mine Health and Safety
Act of 1969: Penalties: Criteria**

While the failure of an operator to abate upon proper notice may reflect upon his good faith in complying with the mandatory standards, such failure is not an element to be considered in determining an operator's negligence in permitting violations to occur.

**Federal Coal Mine Health and Safety
Act of 1969: Penalties: Criteria**

Each violation of sec. 109 of the Act should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Evidence

A notice charging violation of sec. 305 (g) of the Act must be supported by facts from which a conclusion can be drawn as to the "frequency" of inspections made by the operator.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Vacation

Where the Secretary has not promulgated regulations concerning approved recording books required in sec. 303(g) of the Act, and the operator's statement is unrefuted that he had made the air readings required therein, a Notice of Violation of that section will be vacated.

Federal Coal Mine Health and Safety Act of 1969: Penalties

Ratliff v. Hickel, Civil Action Number 70-C-50-A (W.D.Va., Filed April 23, and 30, 1970), is not a bar to assessment of penalties in this proceeding.

APPEARANCES: James W. McGlothlin, Esquire, John L. Kilcullen, Esquire, and Peter F. Healey, Esquire, for appellant; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, and Bernard M. Bordenick, Trial Attorney, for U.S. Bureau of Mines.

OPINION BY MR. ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

A hearing was held on this matter on June 15, 1971, pursuant to Lawson's request for formal adjudication under 30 CFR 100.4(h). Lawson did not file an answer to the Bureau of Mines' (Bureau) Petition to Assess Penalties and failed to appear at the hearing. On motion of the Bureau of Mines the Examiner held Lawson in default and by De-

cision and Order of June 17, 1971, assessed penalties against Lawson in the total amount of \$9,800. Upon request of Lawson's counsel the record was reopened for the purpose of "filing of new evidence concerning his violations and his guilt or innocence in committing same." Lawson waived oral hearing, but submitted its case on an affidavit by Robert G. Lawson, and the Bureau filed comments thereon. On October 29, 1971, the Examiner issued an Opinion and Supplemental Order amending his original assessment of penalties for the 21 violations to the total amount of \$6,575.

On appeal to this Board Lawson contends that the Examiner misapplied the criteria of sec. 109(a) (1) of the Act,² and that as to several violations either Lawson did all that could reasonably be expected or the necessary equipment or personnel were not available.

The Bureau contends that the issue of Lawson's liability for each violation was settled by virtue of Lawson's default at the initial hearing, that the Examiner fully and properly considered the criteria of sec. 109(a) (1), that Lawson's evidence regarding the size of his business and the effect of the penalties on his ability to continue in business

² Section 109(a) (1) reads in part:

"* * * In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

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is insufficient, and that the Examiner's assessment of penalties was proper.

A summary of the background of assessments in this proceeding is as follows:³

Notice of Violation	Date ⁴	Section of Act	POA ⁵ February 1, 1971	APOA ⁶ March 11, 1971	Examiner's original order June 17, 1971	Examiner's amended order October 29, 1971
1 GWH-----	July 27, 1970	305(e)	\$25	\$25	\$350	\$100
2 GWH-----	do-----	312(a)	25	25	350	175
4 GWH-----	do-----	303(g)	25	25	150	150
5 GWH-----	do-----	305(g)	25	25	300	300
6 GWH-----	do-----	317(p)	25	25	200	100
7 GWH-----	do-----	303(c)(1)	50	25	350	350
8 GWH-----	do-----	303(b)	50	25	1,000	100
9 GWH-----	do-----	316	25	25	350	100
10 GWH-----	do-----	306(d)	50	25	300	350
11 GWH-----	do-----	306(a)	50	25	450	450
1 GWH-----	July 28, 1970	317(g)	50	25	250	250
2 GWH-----	do-----	310(d)	25	25	500	500
3 GWH-----	do-----	307(a)	25	25	1,000	1,000
4 GWH-----	do-----	305(j)	25	25	750	750
5 GWH-----	do-----	317(f)(1)	50	25	1,750	750
6 GWH-----	do-----	305(m)	25	25	500	500
7 GWH-----	do-----	202(a)	7 25			
1 GWH-----	July 29, 1970	317(c)	50	25	250	100
2 GWH-----	do-----	302(a)	50	25	250	100
3 GWH-----	do-----	303(o)	50	25	250	100
4 GWH-----	do-----	303(t)	25	25	250	250
1 GWH-----	Aug. 28, 1970	302(a)	50	25	250	100
Totals (21 notices)-----			\$800	\$525	\$9,800	\$6,575

⁴ All of the Notices were issued for violations of the interim standards of Title III of the Act which became effective on March 30, 1970.

⁵ Proposed Order of Assessment issued pursuant to 30 CFR 100.4(b) (36 F.R. 779, January 16, 1971).

⁶ Amended Proposed Order of Assessment issued pursuant to 30 CFR 100.4(g)(3) (36 F.R. 779, January 16, 1971).

⁷ Vacated by Assessment Officer in Amended Order of Assessment and not subsequently charged by Bureau.

This Board has been delegated the Secretarial responsibility of weighing the effects of enforcement policy, including the effects of monetary penalties, on the overall public interest and sound administrative policy. Admittedly, this is a most difficult task. However, in this capacity we have reviewed the

entire record in this proceeding, including the briefs of the parties, and we conclude that the total penalty assessment of the Examiner is too high and is not consistent with a just administration of the Act for reasons hereinafter stated.

³ Official notice is taken by the Board of the Proposed Order of Assessment and the Amended Proposed Order of Assessment.

We view the provisions of sec. 109(a)(1) as manifesting an intent by Congress to require a balancing process in arriving at an appropriate penalty to be assessed in any given case. Application of the criteria of sec. 109(a)(1) requires weighing the importance of imposing pecuniary penalties, as a measure of deterring insufficient concern for the health and safety of miners, against other deterrents specified in the Act, such as closure orders. The amount of a monetary penalty imposed should be sufficiently high to deter any laxity of vigilance on the part of an operator to keep his mine in compliance with the Act. In our view, however, the imposition of a penalty which would cripple an operator's ability to continue his production of coal without a counterbalancing benefit to the safety of miners would not be appropriate.

We do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance. The Act contains several enforcement provisions permitting the closure of mines to protect the health and safety of miners. We believe that the intent of Congress was to give the Secretary great latitude in the assessment of monetary penalties so as to permit him to weigh the equities and render justice on a case-by-case basis. Of course, in doing so we must be particularly conscious of two of the statutory criteria—the size of the operator's business and the effect of a penalty on the operator's ability to

continue in business. The most severe penalty authorized by the Act is mine closure with its consequent loss of production, idlement of miners, and impact upon both the operator and the public. We believe Congress intended a balanced consideration of all statutory factors, including the size of mine and the ability to remain in business, to permit assessments which would be equitable and just in all situations but which would not have the effect of drastically curtailing coal production or employment of miners to the ultimate detriment of the public interest.

In this case the Board considers that the controlling criteria of sec. 109(a)(1) are the size of Lawson's operation and the effect the penalty assessments may have upon Lawson's ability to stay in business. Where numerous violations are found and cited during a tour of inspection, the aggregate amount of the proposed assessments, even though each separate violation may be assessed at a nominal value, may be an amount beyond the operator's ability to pay, and thus, for no other reason than this, may be unreasonable. In such cases it is incumbent upon an Examiner and this Board to look at the total amount and impact of the monetary penalty in arriving at a fair assessment.

Lawson's Mine No. 3 is operated by Robert G. Lawson as an individual. He employs eight or nine men and produces approximately 70 tons of coal a day which sold for \$7.50 to \$12 per ton in 1970. The mine has

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been operated for 15 years without a fatal accident or serious on-the-job injury. The net profit from Lawson's operation for the year 1970 was \$3,987.57.

Following the initial inspection under the Act of Lawson's No. 3 Mine, the mine was closed for a period of six weeks in order to achieve compliance with the Act. Lawson spent approximately \$3,000 on the purchase of required equipment in an effort to comply with the new mandatory standards. This resulted in a loss of employment and production. Upon reopening, Lawson's No. 3 Mine was found to be in compliance with the Act.

Considering the facts referred to above, we find that Lawson operates a small business and that the imposition of penalty assessments in the total amount of \$6,575 could jeopardize Lawson's ability to remain in business. We therefore conclude that justice requires mitigation of the assessments made by the Examiner.

We also find that the Examiner erred in interpreting and applying the criteria of sec. 109(a)(1) as follows:

(1) The Examiner took into account, when considering Lawson's history of past violations, the failure of Lawson to abate a violation within the time set for abatement in the notice of violation. All violations, except one, were found during the first inspection of Lawson's No. 3 Mine under the Act. Therefore, as to those violations there were no

prior inspections and no history of previous violations.

(2) The Examiner erred in concluding that Lawson demonstrated a lack of good faith as to each violation which was not abated within the time set in the original notice of violation. The only evidence in the record supporting this conclusion is the bare opinion of the inspector that Lawson was not in good faith as to five violations. This is not sufficient.

The mere fact that additional time was given to abate a specific violation does not show bad faith. We can think of reasons short of bad faith of the operator which would necessitate an extension of time for abatement. Additionally, we are cognizant of the power of an inspector to issue an order of withdrawal for violations not timely abated and assume that such order would be issued where an operator consistently demonstrates bad faith in accomplishing abatement. Since the record is devoid of facts showing a lack of good faith on the part of Lawson, and considering the voluntary closure of Lawson's mine, his expenditure of funds, and the fact that all violations were abated within the time allowed by the Bureau, we hold that the operator exhibited good faith in attempting to achieve rapid compliance with the Act after notification of each violation.

(3) The Examiner erred in finding negligence on the part of Lawson as to those violations where Lawson failed to abate the violation

within the period of time set for abatement in the notice of violation. Negligence involves the failure to do what a reasonable man would do under the same or similar circumstances to prevent a violation of the Act. Negligence must be determined on the basis of circumstances leading to the existence or occurrence of the violation. The question to be decided here is whether Lawson's actions in attempting to prevent violations were those of a reasonable man. Although we find that the record supports a conclusion that Lawson was negligent in permitting all violations to occur, we reject the Examiner's findings of negligence based upon the failure of Lawson to abate certain violations within the times set for abatement by the Bureau. It is our view that while the failure of an operator to abate upon proper notice may reflect upon his good faith in complying with the mandatory standards, such failure is not an element to be considered in determining an operator's negligence in permitting violations to occur.

(4) The Examiner erred in applying the criterion of "the gravity of the violation." He viewed the gravity of each violation only in terms of whether the violation was "serious" or "nonserious." Each violation should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring. The potential adverse effects of any violation must be determined within the context of the conditions or practices

existing in the particular mine at the time the violation is detected. Therefore, the "gravity of the violation" should be based upon facts bearing upon the determination of these considerations and not upon opinion as to whether the violation is "serious" or "not serious."

On this record the evidence of gravity is insufficient as to all violations except six. The inspector testified that four violations (10 GWH 7/27, 3 GWH 7/28, 4 GWH 7/28, and 6 GWH 7/28) involved a substantial possibility of causing an electrical fire or electrocution. One notice (1 GWH 7/28) specifies an absence of firedoors in a mine opening 37 feet from a wood surface structure and involves a potential hazard of a surface fire extending into the mine or suffocation from smoke inhalation by miners underground. Another notice (5 GWH 7/28) specifies an obstructed escape-way and lack of direction signs, creating the obvious hazard of the inability of miners to escape in an emergency. The Board therefore finds that the gravity of these six violations is established. The specification of the violations in the latter two notices, in the absence of countervailing evidence, is sufficient to establish the element of gravity in this proceeding.

(5) Notice of Violation 5 GWH (7/27/70) charges a violation of section 305(g) of the Act in that "Frequent inspections [by the operator] of electrical equipment were not made or recorded." The term

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"frequent" requires a conclusion drawn from facts. We find no facts either in the Notice of Violation or in the record from which any conclusion can be drawn as to the frequency of inspections made by Lawson. In addition, the Notice fails to advise Lawson as to the frequency of electrical inspections required for compliance with the Act. We find that this Notice fails to specify a valid violation and therefore Notice 5 GWH (7/27/70) is VACATED.

(6) Notice of Violation 4 GWH (7/27/70) charges a violation of sec. 303(g) for the failure of Lawson to take weekly air readings at the main return and for failure to record weekly air readings. Section 303(g) requires that:

* * * A record of such measurements shall be recorded in ink or indelible pencil in a book approved by the Secretary. * * * (Italics added)

Lawson correctly contends that the Secretary did not promulgate regulations concerning approved recording books until November 1970. See 30 CFR 75.1803 (35 F.R. 17890, Nov. 20, 1970). Since no recording book had been approved by the Secretary at the time of the inspection of Lawson's mine, the Bureau cannot properly charge Lawson with a failure to record the weekly air readings. Furthermore, Lawson's statement that he was making the air readings required by section 303(g) is unrefuted. The burden is upon the Bureau to prove

that a violation did occur and since the record does not indicate the basis for the inspector's allegation we find that the Bureau has failed to prove a violation by a preponderance of the evidence. Therefore, Notice No. 4 GWH (7/27/70) is VACATED.

We find no validity to Lawson's argument that assessment of a penalty as to some of the violations is precluded by the injunction issued in *Ratliff v. Hickel*, Civil Action No. 70-C-50-A (W.D.Va., filed April 23 and 30, 1970). Our reading of the record with respect to this argument fails to convince us that Lawson sufficiently established the unavailability of personnel or equipment contemplated by *Ratliff*. Therefore, *Ratliff* is not a bar to assessment of penalties in this proceeding.

Under all of the circumstances, and having carefully weighed and considered the statutory criteria set forth in section 109(a)(1) of the Act, we conclude that the Examiner's assessments in this case are excessive. We do not believe the Examiner's assessments properly reflect Lawson's lack of previous violations under the Act, the appropriateness of the penalties to the size of Lawson's business, the effect of the penalties on Lawson's ability to continue in business, the gravity of the violations, or Lawson's good faith in achieving compliance with the Act. Therefore, the Examiner's assessments are reduced in accordance with the following schedule:

Notice of Violation	Date	Section of Act	Assessment
1 GWH-----	July 27, 1970	305(e)	\$10
2 GWH-----	do-----	312(a)	10
4 GWH-----	do-----	303(g)	Vacated
5 GWH-----	do-----	305(g)	Vacated
6 GWH-----	do-----	317(p)	10
7 GWH-----	do-----	303(c)(1)	30
8 GWH-----	do-----	303(b)	15
9 GWH-----	do-----	316	15
10 GWH-----	do-----	306(d)	50
11 GWH-----	do-----	306(a)	25
1 GWH-----	July 28, 1970	317(g)	50
2 GWH-----	do-----	310(d)	25
3 GWH-----	do-----	307(a)	50
4 GWH-----	do-----	305(j)	50
5 GWH-----	do-----	317(f)(1)	50
6 GWH-----	do-----	305(m)	50
1 GWH-----	July 29, 1970	317(c)	10
2 GWH-----	do-----	302(a)	25
3 GWH-----	do-----	303(o)	25
4 GWH-----	do-----	303(t)	25
1 GWH-----	Aug. 28, 1970	302(a)	25
Total-----			\$550

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (211 DM 13.6; 35 F.R. 12081),

IT IS ORDERED, that the Examiner's Order of Assessment is HEREBY MODIFIED to an assessment of civil penalties against Robert G. Lawson Coal Company for the nineteen (19) violations above-listed in the total amount of \$550.

IT IS FURTHER ORDERED, that this assessment be paid on or before June 12, 1972.

C. E. ROGERS, JR., *Chairman.*

WE CONCUR:

DAVID DOANE, *Member.*

JAMES M. DAY, *Ex Officio Member.*

PECCO COAL COMPANY***1 IBMA 123**

Decided *May 18, 1972*

Appeal from a decision by Alfred P. Whittaker, Departmental Hearing Examiner, assessing civil penalties in the total amount of fourteen hundred dollars (\$1,400) pursuant to the Federal Coal Mine Health and Safety Act of 1969.

Decision modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

Mitigation of a penalty under section 109 of the Act is not a condonation of a violation.

Federal Coal Mine Health and Safety Act of 1969: Appeals: Review

Review by the Board is not limited to a

*Not in Chronological Order.

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determination that the Examiner was arbitrary or capricious.

Federal Coal Mine Health and Safety Act of 1969: Penalties

The assessment of civil penalties under sec. 109 of the Act must be judged on the particular set of facts in each instance, and mitigation in one case may not warrant mitigation in another.

Federal Coal Mine Health and Safety Act of 1969: Penalties

Final authority to assess civil penalties is in the Board as the delegate of the Secretary of the Interior.

APPEARANCES: Joseph W. Justice, Esq., for appellant, Pecco Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Stanley M. Schwartz, Trial Attorney, for appellee U.S. Bureau of Mines.

OPINION BY MR. ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On June 4, 1971, the Bureau of Mines (Bureau) filed a Petition for Assessment of Civil Penalties in accordance with sec. 100.4(i), Title 30, Code of Federal Regulations and pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act").¹ The Bureau sought assessment of civil penalties for five notices of violation and three orders of withdrawal² issued to Pecco Coal Company (Pecco). A hearing was held August 23, 1971, and on December 22, 1971, the Hearing Examiner issued a decision assessing Pecco the following penalties:

Violation No.	Date of Issuance	Section Violated	Amount Assessed
N/V 1 BAT-----	July 15, 1970	303(c)	\$350
N/V 2 BAT-----	do-----	303(d)(1)	150
N/V 4 BAT-----	do-----	303(t)	150
N/V 5 BAT-----	do-----	317(c)	250
N/V 6 BAT-----	do-----	317(p)	250
O/W 1 BAT-----	July 16, 1970	302(a)	250
Total-----			\$1,400

Pecco filed a timely Notice of Appeal to the Examiner's decision, and on March 1, Pecco filed a brief challenging the decision as arbitrary and capricious, and not adequately considering the statutory criteria of sec. 109(a)(1) of the Act. In addition to these allegations, specific objections were made to each of the assessments, and objection was made to the total amount of the penalties

when considered in light of the size of the operator's business and its ability to stay in business.

The Bureau filed a brief on March 24, 1972, asking that the Examiner's decision be upheld.

¹ P.L. 91-173, 88 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The Petition was withdrawn by the Bureau as to two of the orders of withdrawal and no penalties were sought for the violations described in the orders.

Pecco Coal Company's No. 5 Mine is operated by Sam Pecco as an individual. It is a small mine that employed four men, in addition to Sam Pecco. All of the men worked in the same area and were generally within sight and hearing distance of one another. The mine is apparently a slope mine that has been driven only about 400 feet. About 75 to 100 tons of coal a day were produced from the mine in 1970. The total profit in 1970 was \$4,158.04³ from gross receipts of \$39,129.24. The mine was closed October 30, 1970, and, apparently, is still closed. The inspection that gave rise to the above notices of violation was the first inspection of No. 5 Mine pursuant to the Act. All of the violations cited were abated within the time set by the Bureau.

After considering the above facts, the entire record, the briefs of the parties, and the criteria set forth in section 109 of the Act, the Board is of the opinion that the Examiner's decision should be modified as follows:

Notice of Violation No. 1 BAT

At the time of the inspection, Mine No. 5 had been driven only four hundred feet. There is no evidence in the record to show that there was a lack of ventilation in the mine or that there was a build-up of toxic gas at the face. We also note that the record indicates that the brattice was removed *temporarily* while the operator was blasting coal,

and would have been replaced after the blasting was done. Therefore, it appears that there was minimal danger to the miners even if it had been shown that ventilation was inadequate.

Notice of Violation No. 2 BAT

In Notice No. 2 Pecco was cited for failing to make preshift examinations. On the basis of the testimony at the hearing, the Examiner found that Pecco had been making the preshift examinations, but had not been recording the results of such examinations in a book approved by the Secretary. We take notice that no book had been approved by the Secretary on the date of the inspection, July 15, 1970, and that no book was approved until November 20, 1970. *See* 35 F.R. 17929; *see also* 35 F.R. 12950-51. Therefore, since Pecco was making preshift examinations, and keeping a written record thereof, it was in compliance with the Act at the time of the inspection. Therefore, this Notice is VACATED.

Notice of Violation No. 4 BAT

This notice charged Pecco with failure to have an approved plan of action to be taken in the event the mine fans should stop. The evidence in the record as to gravity is the Bureau inspector's testimony that a total lack of a plan of action to be taken when the mine fan stops would be serious, but that the mere failure to have a plan in printed form " * * * couldn't be a hazard." The record supports a conclusion that Pecco had a plan, obviously recog-

³ The Examiner found this to be a net profit, but there is nothing in the record to show that it was not gross profit.

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nized by those immediately concerned, the miners, but that it was not in printed form and had not yet been submitted to the Secretary for approval. Therefore, we look upon this as a merely technical violation.

*Notice of Violation No. 5 BAT*⁴

The violation charged in this notice was for failure to have an approved smoking material search program. We do not believe the record supports a finding that this violation was grave. Each man working in this mine worked in the same area as the other miners and the operator. The men were under the daily observation of the operator. Therefore, the possibility that smoking materials might be brought into and used in the mine was no greater under Pecco's observance than it would be if Pecco had made the required, personal searches.

Notice of Violation No. 6 BAT

Although the lack of the prescribed check-in check-out system is a grave violation, we must consider the circumstances present in this mine. With all five men working in the same area, there is very little probability that anyone could be unaccounted for in the event of an accident or that, as described by the Bureau inspector, an injured man might lie all night in the mine and no one would know he was there.

Order of Withdrawal No. 1 BAT

This violation charged Pecco with having an inadequately supported roof in one area of the mine. Although we do not question the gravity of bad roof conditions, the evidence in this record is that the area in question was unused and not intended to be used. Consequently, since it is not probable that the miners were exposed to this hazard, we are unable to conclude that the violation is grave.

In mitigating the penalty for any of the above violations, we in no way imply that we condone any violation. Each case must be judged on its factual basis, and although a particular set of facts may warrant mitigation in one instance, it may not do so in a second instance. We emphasize that strict compliance with applicable mandatory standards is always expected by the Board.

We also think it appropriate here to comment upon a statement in the Bureau's brief that, upon review by the Board, the decision of an Examiner "* * * must stand unless an operator can show that such assessment is arbitrary or capricious or that certain evidence was improperly admitted or excluded." This concept of the Board's review authority is erroneous. Although an Examiner is clearly authorized to assess penalties within his discretion final authority and discretion resides in the Secretary and this Board, as the delegate of the Secre-

⁴ The Examiner made no finding of gravity for Notice Nos. 5 BAT and 6 BAT, and Order No. 1 BAT. However, the record is sufficient for the Board to make findings on gravity.

tary's review authority under the Act (43 CFR 4.1(4), 211 DM 13.6). Therefore, in reviewing penalty assessments of an Examiner, the Board may adopt, modify, or set aside any finding, conclusion, or order of an Examiner, 43 CFR 4.605.

Upon careful consideration of all of the above factors, particularly in light of the nature of the violations when related to the size of the mine, we are of the opinion that the penalties assessed by the Examiner should be mitigated.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (211 DM 13.6; 35 F.R. 12081), IT IS HEREBY ORDERED:

1. That Notice of Violation No. 2 BAT IS VACATED;

2. That the decision of the Examiner issued December 22, 1971, IS MODIFIED and the following assessments are made:

<i>Violation No.</i>	<i>Amount assessed</i>
N/V 1 BAT-----	\$50
N/V 4 BAT-----	25
N/V 5 BAT-----	25
N/V 6 BAT-----	25
O/W 1 BAT-----	50

Total ----- \$175

3. That Pecco Coal Company pay one hundred seventy-five dollars (\$175) on or before June 19, 1972.

C. E. ROGERS, JR., *Chairman.*

I CONCUR:

DAVID DOANE, *Member.*

HALL COAL COMPANY, INC.*

1 IBMA 175

Decided August 22, 1972

Appeal from a decision by Ernest F. Hom, Chief Administrative Law Judge (formerly Chief Hearing Examiner), Office of Hearings and Appeals, Docket No. PIKE 72-45-P, dated January 18, 1972, assessing Hall Coal Company, Inc., civil penalties in the total amount of \$2,100 pursuant to the Federal Coal Mine Health and Safety Act of 1969 (hereinafter the "Act")¹ for seven notices of violation issued during inspection of Hall's No. 8-C Mine on May 12, 1970.

Decision of the Examiner MODIFIED.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Evidence

Where Congress has specified the percentages of incombustible material allowable in sec. 304(d) of the Act, it is necessary for the Bureau of Mines to present probative evidence—more than a mere visual observation of the inspector.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Evidence

In the absence of evidence, such as business and tax records, showing that a penalty under sec. 109 of the Act will affect the ability of the operator to stay in business, a presumption exists that the operator will not be so affected.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

The Board, as in this case, may mitigate penalties imposed by an Examiner that

*Not in Chronological Order.

¹ 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

are disproportionate to the violations involved in light of the six criteria established in sec. 109(a) (1) of the Act, particularly considering that the infraction was a first offense, committed shortly after the effective date of the Act, by a small operator, who demonstrated good faith by immediate abatement.

APPEARANCES: Joseph W. Justice, Esquire, for appellant, Hall Coal Company, Inc.; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, and Richard V. Backley, Trial Attorney, for appellee, Bureau of Mines.

OPINION BY THE BOARD

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Bureau of Mines (hereinafter Bureau) sought assessment of civil penalties against Hall Coal Com-

pany, Inc. (Hall) for seven violations of the Act pursuant to sec. 100.4(i) of Title 30, Code of Federal Regulations, and in accordance with sec. 109(a) (1) of the Act, through a Petition for Assessment of Civil Penalties filed on August 23, 1971. Attached to the petition was an Order of Withdrawal, dated May 12, 1970, citing seven violations of the mandatory standards. The Bureau's Assessment Officer originally proposed an assessment for the seven violations in the total amount of \$2,000 which was subsequently amended to \$500. Upon the appellant's request for formal adjudication a hearing was held on January 18, 1972, as a result of which the Chief Examiner issued a decision assessing the following penalties:

Violation No.	Date of Issuance	Section Violated	Amount Assessed
1 RRR-----	May 12, 1970	313(c)	\$500
2 RRR-----	do-----	313(a)	150
3 RRR-----	do-----	313(c) (1)	150
4 RRR-----	do-----	313(h) (1)	150
5 RRR-----	do-----	304(a)	500
6 RRR-----	do-----	304(d)	500
7 RRR-----	do-----	306(f)	150
Total-----			\$2,100

Appellant objects to the decision rendered by the Examiner on the basis that the Examiner was unduly influenced by the Order of Withdrawal to the detriment of appellant; that his decision was arbitrary and capricious, and not otherwise in accordance with the law; and that he failed to consider adequately the

criteria set forth in sec. 109(a) (1) of the Act.² Objection is made both to the individual assessments and to the total amount.

² Section 109 (a) (1) reads in part:

"In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's

Appellee (Bureau) supports the decision of the Examiner. Considering the admissions, made by appellant at the hearing, the Bureau maintains that the penalties assessed were not arbitrary or capricious, and that they were not excessive in light of sec. 109(a)(1) of the Act. The Bureau contends that upon review it is incumbent upon appellant to demonstrate that the amounts set by the Examiner were not proper, and further maintains that it was not error for the Examiner in assessing penalties to consider the issuance of an Order of Withdrawal as bearing upon the gravity of the violations.

FACTUAL BACKGROUND

Leonard Hall is the owner and operator of Hall Coal Company's No. 8-C Mine. He has been engaged in underground coal mining for approximately 30 years, 23 of which were as an independent operator. Mine No. 8-C had been in operation for some two years prior to the issuance of the citations here involved. At the time of the citations, the mine, in which Hall employed five men, produced about 125 tons of coal per day. Hall was under a contract to sell this output of coal to Standard Sign and Signal for \$5.60 a ton. During his career as an operator, Hall has never had a serious accident at any of his mines. All seven of the violations cited in the

Order were abated within 24 hours after issuance of the Order, and there is no history of previous violations under the Act. The Order citing the violations was issued on May 12, 1970, less than two months after the effective date of Title III of the Act.

Upon consideration of the entire record and the guidelines established in sec. 109(a)(1) of the Act, the Board is of the opinion that the Examiner's decision should be modified.

Violation No. 6 RRR

The Board cannot agree with the finding of the Examiner that a violation of sec. 304(d) of the Act was demonstrated at the hearing. Despite the testimony of the operator to the effect that the rock dust could have been inadequate, the Board finds that the Bureau failed to prove this alleged violation by a preponderance of the evidence. Section 304(d) of the Act enumerates the percentages of incombustible material which must be maintained.³ The inspector based his conclusion regarding percentages and the degree of rock dusting solely

³ Section 304(d) reads as follows:

"Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required." (Also contained in 30 CFR 75.403)

ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

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on a visual observation. We do not believe this is sufficient, and we hold that in order to meet its burden the Bureau must present probative evidence on the elements of the alleged offense.

The Board takes official notice of instructions issued by the Bureau of Mines to its inspectors wherein the importance of collecting samples to support violations of sec. 304(d) is recognized.⁴ Since Congress specifically delineated percentages, we have no alternative but to hold that an alleged violation of this section must be supported by more than the mere visual observation of an inspector. Unless samples support an alleged violation of section 304(d), it cannot be sustained. We do not intend by this decision to preclude the inspector from taking affirmative action to protect the health and safety of the miners by way of im-

mediate issuance of orders or notices pending the results of analysis of dust samples. The record herein, lacking sufficient factual basis for this notice, does not support the Examiner's finding of violation, and the notice should be vacated.

Violation Nos. 1 RRR and 5 RRR

The operator was cited for violation of secs. 313(c) and 304(a) of the Act. Section 313(c) requires that only "permissible explosives, electric detonators of proper strength and permissible blasting devices" be employed for blasting purposes. While the Board takes note of the difficulty which some operators experienced in securing approved equipment, the testimony of the operator in this case indicates that the order for this equipment was not even placed until on or after the effective date of the Act (March 30, 1970). Section 304(a) of the Act prohibits an operator from allowing an accumulation of coal dust. Notwithstanding the operator's testimony that the normal clean-up day was each Friday, this practice does not justify his allowing a substantial accumulation to occur. The use of fuses and blasting caps where there is an accumulation of coal dust presents a potential danger of fire or explosion.

The Examiner properly determined that these violations occurred and that the danger presented was of a graver nature than that presented in the remaining four violations.

⁴ United States Department of the Interior, Bureau of Mines, Coal Mine Safety Inspection Manual for Underground Coal Mines (Superintendent of Documents, United States Government Printing Office, Washington, D.C., Catalogue No. I28.16/2:C63, Stock No. 24041060) at 31 (1971) reads in pertinent part as follows:

"Collection of dust samples to substantiate violations. Except in the case of float coal dust deposited on rock dusted surfaces, the inspector shall collect spot samples to support any violation cited for 75.403; however, such samples need not be collected prior to issuing Withdrawal Orders or Notices.

"Separate samples of mixed dust of (1) the roof and ribs and (2) the floor shall be collected. The band or perimeter method of collecting samples shall not be used. A separate sample shall be collected of the material on the floor to a depth of one inch.

"When the analytical results of the samples show that the Notice or Order should not have been issued the Notice or Order shall be vacated."

Violation Nos. 2 RRR, 3 RRR, 4 RRR, and 7 RRR

These four notices involved alleged violation of the following sections of the Act: No. 2, the failure to hang brattice curtains which would direct air to the working faces (sec. 313(a)); No. 3, sec. 313(c)(1) requiring the operator to test for methane every 20 minutes while electrical equipment was being operated (section 313(c)(1)); No. 4, neglecting to test for methane immediately before blasting (sec. 313(h)(1)); and No. 7, allowing rubber-tired vehicles to pass over an electrical cable (sec. 306(f)). In each of the above instances the operator admitted the practices and the Examiner properly found them to be violations of the Act.

FACTORS IN MITIGATION

In mitigating the amounts assessed for the six affirmed violations, the Board is influenced by the fact that the amounts set by the Examiner may have a deleterious effect on the continued operation of this mine. We have held that "we do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance."⁵ This case clearly illustrates the utilization of the two primary tools for enforcement provided in the Act. The Order of Withdrawal was employed in this case to provide for the immediate safety of the miners, with conse-

quent loss of production and idleness of miners. The civil monetary penalties were imposed to impress upon the operator the necessity for exercising a future high degree of vigilance and concern for the health and safety of his miners.⁶

In this case, the Board attaches importance to the facts that this was the first inspection at Hall's No. 8-C Mine, that it was conducted less than two months after the effective date of the Act, and that this is a small mine in which the operator often worked alongside his employees. Under these circumstances we think it reasonable to assume that a monetary penalty of \$2,100 as set by the Examiner would have a disproportionate effect on Hall's ability to continue production. The penalties imposed under the Act should not be regressive in nature, but tailored, not only to fit each violation, but each violator.

The evidence of whether a penalty will affect the ability of the operator to stay in business is, of course, peculiarly under the operator's control. There is, therefore, a presumption that the operator will not be so affected in the absence of contrary evidence. Hall's rough estimate that he lost approximately \$1,000 the preceding year is not sufficient to rebut this presumption. Hall has access to and we think could have presented business and tax records which would have been of significant value in determining the effect of a monetary penalty on his operation. We also recognize

⁵ *Robert G. Lawson Coal Company, 1 IBMA 115, 113, 79 I.D. 657 (1972).*

⁶ *Id.* at 117.

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that the Examiner afforded Hall ample opportunity to present this kind of documentation. Nevertheless, even though Hall did not elect to offer direct evidence on this criterion, we are of the opinion that the record evidence is sufficient to permit a reasonable determination of the appropriateness of the penalty with respect to the size of the business.

The evidence demonstrates that although Hall was negligent in allowing the violations to occur he acted in good faith to abate them. His record of safety in the past 23 years is commendable and the Board gives substantial weight to the fact that all violations were abated within a 24-hour period.

In view of the foregoing, we conclude that the penalties imposed by

the Examiner were disproportionate to the violations involved in light of the criteria established in sec. 109(a)(1) of the Act. We believe that the modified penalties ordered below are more reasonable and are sufficient to impress upon Hall the necessity of maintaining proper vigilance for the health and safety of his employees.

Upon careful consideration of the record and statutory criteria, and particularly considering the facts that this was a first offense, committed shortly after the effective date of the Act, by a small operator who demonstrated good faith by immediate abatement, the Board is of the opinion that the penalties assessed by the Examiner should be reduced to the following amounts:

Violation No.	Date of Issuance	Section of Act	Amount Assessed
1 RRR-----	May 12, 1970	313(c)	\$150
2 RRR-----	do-----	313(a)	50
3 RRR-----	do-----	313(c)(1)	50
4 RRR-----	do-----	313(h)(1)	50
5 RRR-----	do-----	304(a)	150
7 RRR-----	do-----	306(f)	50
Total-----			\$500

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (211 DM 13.6; 35 F.R. 12081), IT IS HEREBY ORDERED:

1. That Notice of Violation No. 6 RRR IS VACATED;

2. That the decision of the Examiner issued on January 18, 1972,

IS MODIFIED in accordance with the above schedule and the Hall Coal Company, Inc., IS ORDERED to pay five hundred dollars (\$500) on or before September 25, 1972.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

OLD BEN COAL CORPORATION***1 IBMA 182***Decided August 30, 1972*

Appeal by Old Ben Coal Corporation from an order of Ernest F. Hom, Chief Administrative Law Judge (formerly Chief Departmental Hearing Examiner), dismissing as untimely filed an application for review of an order of withdrawal. (Docket No. below: **VINC 72-68.**)

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Timeliness of Filing

The right to have an action reviewed arises at the time of the cause of action, and if an operator's cause of action relates to an order of withdrawal, his time for filing for review of that order begins to run upon receipt of that order.

APPEARANCES: Robert E. Anderson, Esquire, for appellant, Old Ben Coal Corp.; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, John H. O'Donnell, Trial Attorney, for appellee, U.S. Bureau of Mines; Edward L. Carey, Esquire, Willard P. Owens, Esquire, Charles L. Widman, Esquire, for appellee, United Mine Workers of America.

*OPINION BY THE BOARD**INTERIOR BOARD OF MINE OPERATIONS APPEALS**Factual and Procedural Background*

On April 19, 1972, Old Ben Coal Corporation (Old Ben) received from the Bureau of Mines (Bureau)

a withdrawal order for Mine No. 21. The order was issued pursuant to subsection 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "the Act") on the grounds of imminent danger.¹ On April 20, 1972, the Bureau terminated the order, when the conditions leading to the issuance of the order had been totally abated. Old Ben sought review of the order of withdrawal, pursuant to section 105 of the Act, by mailing an application for review from Cleveland, Ohio, by certified mail, in an envelope postmarked May 19, 1972. The application was stamped as received in the Office of Hearings and Appeals on May 22, 1972.

The Bureau and the representative of miners, the United Mine Workers of America (UMWA), both filed answers to the application. In the answers, neither party questioned whether the application was filed within the statutory 30 days permitted for filing.

On July 3, 1972, the Hearing Examiner, on his own motion, dismissed the application, ruling that it was untimely filed, inasmuch as it was not received by the Office of Hearings and Appeals until more than 30 days after service of the order of withdrawal.²

On July 21, 1972, Old Ben filed with this Board a timely notice of appeal to the order of dismissal, and

¹P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

²Under the rules of the Department, an application is considered filed only when it is received by the Office of Hearings and Appeals. 43 CFR 4.22(a), 4.508.

*Not in Chronological Order.

on July 24, filed its brief arguing that the Examiner had misapplied the time limit prescribed in section 105 of the Act for filing applications, in that he calculated the time as commencing to run from receipt of the *order of withdrawal* instead of from the *order of termination*.³ Old Ben further argues that section 4.530 of the procedural Rules,⁴ which is the Department's understanding of the time limit in section 105, is contrary to the statute.

On August 7, 1972, a timely brief was filed by the UMWA supporting the Examiner's conclusion that section 4.530(c) of the Rules correctly interprets the date on which the time limit for review of an order of withdrawal commences to run. On August 14, 1972, the Bureau filed a brief arguing that: (1) the time limit in section 105 of the Act is jurisdictional; (2) section 4.530(c) of the Rules is controlling; and (3) section 4.530(c) is a reasonable interpretation of the subject time limit.

ISSUE PRESENTED TO THE BOARD FOR REVIEW

When does the time commence to run for filing an application for review of an order of withdrawal, pursuant to section 105 of the Act and 43 CFR 4.530(c) of the procedural Rules issued thereunder?

³ If calculated from the termination, the thirtieth day was a Saturday, and Old Ben would have had until the next working day to file, which was May 22, 1972. 43 CFR 4.22(e). If calculated from the order of withdrawal, the thirtieth day was a Friday, May 19, and the application was due that day.

⁴ 43 CFR 4.530(c).

DISCUSSION

Subsection 105(a) (1) of the Act states *inter alia*:

An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order *within thirty days of receipt thereof or within thirty days of its modification or termination* * * * (Italics added).

This section's time limit has been implemented by the Department's Rules as follows:

* * * An application for review shall be filed within 30 days of receipt by the applicant *of the order or notice sought to be reviewed* or within 30 days of receipt of any modification or termination of an order where review is sought of the modification or termination.* * * 43 CFR 4.530(c). (Italics added.)

The effect of the above Rule on Old Ben's application is evident. Old Ben seeks review of the order of withdrawal which it received on April 19. It does not seek review of the termination of the order. It was incumbent upon Old Ben to file its application for review within 30 days of April 19, *i.e.*, by May 19. After that date, Old Ben could no longer file for review of the order under section 105 of the Act, because "[t]he 30-day time limit prescribed in section 105(a) for the filing of an application for review constitutes a statutory [jurisdictional] limitation on our authority to review such application * * *." *Freeman Coal Mining Corp.*, 1 IBMA 1, 21, 77 I.D. 149, 161

(1970); *accord Consolidation Coal Co., Inc.*, 1 IBMA 131, 79 I.D. 413 (1972).

Old Ben's argument appears to be more concerned with the application and validity of section 4.530(c) of the Rules than with the Act or Examiner's order, since it appears to be seeking an interpretation of the Act contrary to what we understand to be the clear meaning stated by this Department's Rules. It argues that the time for filing should commence to run upon receipt of the order of termination, because an operator may not know whether a withdrawal order will subsequently be modified or terminated and therefore doesn't know whether he wishes to have the order reviewed until such subsequent action is taken. We cannot agree. We believe that 43 CFR 4.530(c) of the Rules is an accurate restatement of the time limit prescribed in section 105, and that this Rule, which was properly published, binds this Board.

The right to have an action reviewed arises at the time of the cause of action, and if the operator's cause of action relates to the order of withdrawal, his time for filing for review of that order begins to run upon receipt of that order. To read section 105 differently would give no meaning to its language "* * * may apply * * * for review of the order within thirty days of receipt thereof * * *." (Italics added.) The disjunctive "or", which follows this language, does no more than recognize that if the cause of action arises out of some-

thing other than the order, *e.g.* modification or termination, the 30 days commence to run from that event and not from receipt of the underlying order. The disjunctive clause would be applicable, in most cases, to a representative of miners seeking review of a modification or termination of an order. In this case, it has no application to Old Ben, since it is clearly seeking review of the withdrawal order received April 19, 1972.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Order of the Hearing Examiner, issued July 3, 1972, dismissing Old Ben Coal Corporation's application for review IS AFFIRMED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

GLENN MUNSEY, EARNEST SCOTT,
AND ARNOLD SCOTT

v.

SMITTY BAKER COAL
COMPANY, INC.*

1 IBMA 208

Decided October 20, 1972

Petition filed by Appellee-Petitioners, Glenn Munsey, Arnold Scott, and Earnest Scott for reconsideration of Board's decision of August 8, 1972. The

*Not in Chronological Order.

October 20, 1972

decision of August 8 reversed the decision of William Fauver, Departmental Hearing Examiner (now Administrative Law Judge), which reinstated three miners to employment pursuant to sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Decision of the Board Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Protected Activities

The Congress limited protection in sec. 110(b) of the Act to three specific activities, and the Secretary and his delegates must limit administration of the Act to what the Congress has explicitly authorized.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Elements of Proof

An operator must know or believe that a miner has commenced a process that is intended to result in a notification of a danger or safety violation to the Secretary or his authorized representative before a violation of sec. 110(b) (1) (A) can take place.

Administrative Practice

Administrative agencies have the power to make their own findings regardless of the findings of an Examiner so long as their findings are based on substantial supporting evidence in the record.

APPEARANCES: Edward L. Carey, Esquire, Willard P. Owens, Esquire, Charles L. Widman, Esquire, for Appellee-Petitioners, Glenn Munsey, Earnest Scott, and Arnold Scott; Logan E. Patterson, Esquire, for Respondent, Smitty Baker Coal Co., Inc.

MEMORANDUM OPINION AND ORDER UPON RECONSIDERATION

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On August 8, 1972, this Board rendered a decision in the above-entitled matter reversing the initial decision of the Hearing Examiner and denying the Petition For Reinstatement To Employment filed by Glenn Munsey, Earnest Scott, and Arnold Scott (Applicants) pursuant to sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969.¹ *Munsey v. Smitty Baker Coal Co., Inc.*, 1 IBMA 144, 79 I.D. 501 (1972).

Applicants, on August 25, 1972, petitioned the Board for reconsideration of the August 8 decision and requested a stay of the decision until 30 days after the Board's ruling on reconsideration. The Board, on August 28, 1972, stayed the effective date of the decision until further order and gave the Respondent, Smitty Baker Coal Company, Inc. (Smitty Baker), an opportunity to file a brief. On September 15, 1972, counsel for Smitty Baker filed a brief opposing Applicants' arguments on reconsideration.

Applicants' first contention is that the Board erred as a matter of law in "equating" this matter to the use of sec. 110(b) as a vehicle for resolving general labor grievances.

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970) (hereinafter "the Act").

In support of such contention, Applicants cite a recent decision of the U.S. Court of Appeals for the Third Circuit, *Gateway Coal Co. v. United Mine Workers of America, et al.*, Nos. 71-1641, 71-1642, 71-1786 (3d Cir., decided July 18, 1972). In this decision, the Circuit Court reversed a Federal district court's decision and order enjoining a strike by miners and ruled that the collective bargaining agreement should not have been construed so as to require that disputed safety matters be submitted to arbitration under the labor contract. The Circuit Court held that the Federal policy favoring arbitration was not applicable to disputes involving safety of the miners, and that under the general labor law, an employee may "strike" over a dispute involving safety, irrespective of the fact the labor-management agreement contains a no-strike clause.

However correct the Court's ruling in *Gateway* may be, it is not relevant to the issues in the instant case and sheds no light on sec. 110 (b) of the Act. Applicants attempt to cite *Gateway* as *contra* to our ruling that the common, ordinary, and non-technical words of sec. 110(b) limit the protection of miners against wrongful discharges to three narrowly defined activities, *Munsey v. Smitty Baker Coal Co.*, *supra* at 153, 158 (1972), and cannot be broadened to protect miners against all unjust or unfair labor practices, which normally are subject to arbitration or remedies un-

der general labor law. *Gateway* simply recognizes that included within the general labor law is a right to strike. Nevertheless, even if the miners have a right to strike because of a safety dispute, this Board still has no jurisdiction to protect such right under the Act because of the clearly restrictive language of sec. 110(b). For the purpose of the Act, the three rights enumerated in sec. 110(b) are *suvi generis*.

Applicants urge once again the contention that the Act, as remedial legislation, must be given a liberal construction to protect miners against discharges for engaging in *any* mine safety activity. A rule of statutory interpretation more fundamental than the one relied upon by the Applicants is that if the language of the statute is clear, unambiguous, and non-technical, it is not subject to the rules of statutory construction. If the Congress wanted to protect miners from being discharged for engaging in *any* mine safety activity, it would have said so. Instead, it limited the protection against discharge for three specific activities, and the Secretary and his delegates must limit administration of the Act to what the Congress has explicitly authorized.

Applicants' second argument is that the Board misinterprets sec. 110(b) (1) (A) of the Act in that the Board does not extend protection to miners who have not notified the Secretary of a violation or danger,

October 20, 1972

but have formed a "desire or design" to do so.

We recognized in the decision being reconsidered that the miner may not be able to complete his notice to the Secretary before being discharged and we held, at page 154, that it is sufficient if he instigates or provides the initial impetus for the notifying process and intends that the report will ultimately be made to the Secretary on his behalf. Nonetheless, the operator's knowledge or belief which motivates the discharge must relate to a notification made or instigated by the miner. A mere design or desire is not enough. The Act requires that the discharge occur by reason of a *notification*; it does not say "by reason of the miner's desire or design to notify the Secretary." Therefore, the operator must know or believe that the miner has commenced a process that is intended to result in a notification of a danger or safety violation to the Secretary or the Secretary's authorized representative before a violation of sec. 110(b)(1)(A) can take place. In the present case, however, the question of actual notice versus a desire or design is not in issue. The evidence is clear in this case that at the time the Applicants were discharged, no actual notice had been given and any desire or design Applicants may have had to notify the Secretary was formed after they were discharged and not before.

Applicants' third contention is a

re-argument of the evidence. Upon reconsideration of the record, we find nothing to convince us that our analysis of the evidence detailed in our decision was incorrect.

Applicants' final argument is that the Board erred in holding that the Examiner did not make findings on the credibility of witnesses, whose testimony was material to certain essential, relevant, and disputed facts. They argue that a preamble to the section entitled by the Examiner "Findings of Fact," which reads, "* * * I find that the preponderance of probative, credible and substantial evidence of this matter establishes the following facts," was a finding on credibility. This, it is concluded, is binding on the Board and dictates the result reached by the Examiner.

We do not agree that such preamble constitutes an appropriate finding of credibility, but for the purpose of this decision it does not matter whether the above-quoted statement is a "finding" of credibility. Applicants' argument is based on the incorrect assumption that the Administrative Procedure Act requires the Board to adopt the findings of fact of an Examiner. Administrative agencies have the power to make their own findings, regardless of the findings of the Examiner, so long as their findings are based on substantial supporting evidence in the record.² Adminis-

² Even though the Board is not bound by an Examiner's findings on credibility, if the find-

trative Procedure Act, § 8(a), 5 U.S.C. § 557(b) (1970); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); K. Davis, Administrative Law § 10.04 (1958). Such power is vested in this Board, 43 CFR 4.1 (4), 4.605; *Pecco Coal Co.*, 1 IBMA 123, 126, 79 I.D. 664 (1972).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)) and having reconsidered our decision of August 8, 1972, IT IS HEREBY ORDERED that:

1. the decision of the Board issued August 8, 1972, IS AFFIRMED; and

2. the Board's order of August 28, 1972, staying the effective date of the decision of August 8, 1972, IS TERMINATED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

ing is based on the demeanor of the witness, it is entitled to special weight. *Bon-R Reproductions, Inc. v. NLRB*, 309 F. 2d 898, 907 (2d Cir. 1962); see Attorney General's Manual on the Administrative Procedure Act at p. 84 (1947). However, in this case, the Examiner did not give the basis for his finding, so we would be unable to give special weight to the finding even if we believed it to be a finding on credibility.

WAYNE BRANHAM, t/a MARK ALAN COAL COMPANY*

1 IBMA 212

Decided October 30, 1972

Interlocutory appeal by Mark Alan Coal Company from a ruling by Administrative Law Judge Edmund M. Sweeney denying Mark Alan's motion to transfer the situs of a civil penalty hearing conducted under the Federal Coal Mine Health and Safety Act of 1969.

Ruling reversed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Generally

It is an abuse of discretion for an Administrative Law Judge to deny a motion to transfer the site of a hearing to any other sites listed in 43 CFR 4.542(a) where it is shown that the site requested is more convenient to the parties.

APPEARANCES: John L. Kilcullen, Esquire, and James W. McGlothlin, Esquire, for appellant, Mark Alan Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, I. Avrum Fingeret, Trial Attorney, for appellee, U.S. Bureau of Mines.

MEMORANDUM OPINION AND ORDER VACATING OR- DER OF ADMINISTRATIVE LAW JUDGE AND SETTING SITE FOR HEARING

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Board has for consideration an oral interlocutory appeal, by

*Not in Chronological Order.

October 30, 1972

Mark Alan Coal Company, through counsel, from the Administrative Law Judge's Order of October 17, 1972, denying Mark Alan Coal Company's motion to transfer the situs of the hearing in the matter to Pikeville, Kentucky. Oral argument was held before the Board on October 30, 1972.

WHEREAS:

(1) On May 31, 1972, a petition for assessment of penalty was filed by the Bureau of Mines.

(2) In its answer mailed on June 12, 1972, Respondent's attorney requested that said hearing be held in Grundy, Virginia for economic and other reasons.

(3) In its preliminary statement filed by Respondent pursuant to the change in Rules effective June 15, 1972, it was requested that the hearing be held in Grundy, or as close thereto as is practicable, thereby allowing Respondent to bring its witnesses to said hearing with a minimum of expense.

(4) At the pre-hearing conference held on October 2, 1972, at Arlington, Virginia, the Administrative Law Judge recorded that prior to the conference he had a telephone conversation with counsel for Respondent and was advised that Respondent is a small operator who could not afford to send counsel to pre-hearing conference (Tr. 1).

(5) On October 4, 1972, the Administrative Law Judge issued an order in which the hearing was set for 9:30 a.m., October 31, 1972, at the Office of Hearings and Appeals, Arlington, Virginia.

(6) October 12, 1972, Respondent filed a motion to transfer the hearing site to Pikeville, Kentucky, on the ground that Respondent did not have the financial ability to sustain expense of appearing in Arlington with counsel and witnesses.

(7) October 17, 1972, the Bureau of Mines filed a response to Respondent's motion to transfer indicating that it had no objection thereto.

(8) October 17, 1972, the Administrative Law Judge, by Order, denied Respondent's motion to change hearing site.

(9) On October 25, 1972, counsel for Respondent mailed to the Administrative Law Judge a request for certification pursuant to 43 CFR 4.591. Counsel, on the morning of October 30, 1972, telephoned the Administrative Law Judge and was informed that Respondent's request for certification had not been received. However, upon being informed of the substance of Respondent's request, the Administrative Law Judge informed counsel that he would deny the request for certification. The Administrative Law Judge further denied Respondent's oral request for a continuance of the hearing pending a request for interlocutory appeal.

(10) On October 30, 1972, counsel for Respondent orally requested the Board of Mine Operations Appeals to entertain an interlocutory appeal of the Administrative Law Judge's Order of October 17, 1972. Counsel for the Bureau of Mines appeared and joined in the request of Respondent for a change of situs.

By virtue of the Rules published June 8, 1972, 37 F.R. 11461, the Office of Hearings and Appeals has adopted a policy whereby it permitted operators to choose from a list of predesignated sites as the situs of civil penalty hearings. Although the site actually chosen was within the discretion of the Administrative Law Judge, variance from the site chosen by the operator was only to consider the overriding consideration of the convenience of the private parties and the Government. 43 CFR 4.542(b). It is our understanding that, within the meaning of this Rule, "Government" is meant to mean the convenience of the Bureau of Mines. By publishing these Rules, the Office of Hearings and

Appeals declared, in effect, that any of the sites listed in 43 CFR 4.542 (a) are deemed convenient to Administrative Law Judges and should be utilized to the fullest extent practicable, consistent with 5 U.S.C. sec. 554(b).

Having heard argument of counsel and considered the issues involved herein the Board is of the opinion that in light of the provisions of sec. 43 CFR 4.542(a) the Judge abused his discretion in denying Respondent's motion to transfer the site of the hearing to Pikeville, Kentucky.

THEREFORE, IT IS HEREBY ORDERED that:

1. The Order of the Administrative Law Judge, issued October 4, 1972, setting a hearing in Arlington, Virginia, on October 31, 1972, **IS VACATED** and

2. The Matter **IS REMANDED** to the Administrative Law Judge for the purpose of holding a hearing in Pikeville, Kentucky at such time and date as he subsequently shall direct.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

JAMES M. DAY, *Ex Officio Member.*

UNITED STATES

v.

E. ROY GRIGG

8 IBLA 331

Decided December 8, 1972

Appeal from decision of Administrative Law Judge Dent D. Dalby (Montana 1818) declaring five mining claims invalid for lack of a discovery.

Affirmed.

Mining Claims: Contests—Mining Claims: Discovery: Generally

The Government may initiate a contest to determine the validity of mining claims. Its delay in bringing a contest after a mineral patent application has been filed cannot serve as a substitute for a discovery by the applicant necessary to validate a claim, nor does the applicant's holding the claims for many years prior to the filing of the application obviate the necessity of evidence of a discovery.

Mining Claims: Contests—Notice

Failure of a mineral examiner to notify a claimant of a field examination is not a sufficient reason in a subsequent contest against mining claims to disqualify the Government's evidence of the examination and sampling, especially where the field examination was of sites previously identified in joint examinations conducted with the claimant.

Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Government Contests—Rules of Practice: Hearings

Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the evidence was presented. The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports and information on the claims.

Mining Claims: Discovery: Generally—Mining Claims: Discovery: Geologic Inference

The requirement of a discovery of a valuable mineral deposit is not met by geological inference, the "intrinsic value" of the minerals sampled, proximity to patented claims, or delay in contesting the

December 8, 1972

claims; instead, there must be a showing of sufficient mineral so that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Discovery: Generally

To verify whether a discovery of a valuable mineral deposit has been made, Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant; they do not do the discovery work for the claimant and do not need to drill to prove or disprove the existence of minerals at depth where the claimant has not done so.

Mining Claims: Discovery: General—Mining Claims: Patent

Inability of a mining claimant to make the necessary capital investment to establish the existence of a discovery of a valuable mineral deposit is not an excuse or substitute for failure of the claimant to prove the existence of the deposit in order to be entitled to a patent for a mining claim.

APPEARANCES: H. A. Bolinger, Esq., of Bolinger & Wellcome, Bozeman, Montana, for appellant; Robert W. Parker, Esq., Office of General Counsel, United States Department of Agriculture, Missoula, Montana.

OPINION BY MRS. THOMPSON

INTERIOR BOARD OF LAND APPEALS

This appeal on behalf of E. Roy Grigg (hereafter referred to as "contestee" or "appellant") arises from the decision of an Administrative Law Judge,¹ dated March 29,

1971, invalidating the Joyanna, Granite Mountain No. 4, Surprise, and Perfect Day lode mining claims and the Granite Mountain Placer mining claim. These claims lie within the Beaverhead National Forest, in unsurveyed sections 16 and 17, T. 3 S., R. 3 W., P.M., Madison County, Montana.

This proceeding was initiated by a contest complaint filed in behalf of the Forest Service, United States Department of Agriculture, against the five claims. The complaint was served on the contestee April 4, 1970. It charged a lack of discovery of valuable mineral on any of the claims, the absence of a discovery of a lode or vein bearing valuable minerals on the Surprise and Granite Mountain No. 4 claims, and a misorientation of boundary lines of the Joyanna and Perfect Day lode claims.

The Administrative Law Judge concluded that the contestee had not discovered a valuable mineral deposit within any of the five claims, and that therefore it was unnecessary to consider the remaining issues.

Appellant generally questions the nature and manner of the Government's initiation of this contest, alleges unfair surprise in the evidence, and contends that there has indeed been a discovery sufficient to require patenting of the claims.

Appellant initially asserts that the Government's contest of his claims is contrary to the intent and purposes of the "Multiple Surface Uses Act, 30 U.S.C. secs. 612 & 613," because the claims are relatively

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

inaccessible and are bordered by patented mining claims, there is general mineralization of the area, and the contest is contrary to the "highest and best use of the land," and the "best interest of the public."

This contest is not a proceeding pursuant to section 5 of the Surface Resources Act of July 23, 1955, *as amended*, 30 U.S.C. sec. 613 (1970), but rather was initiated as a contest of mining claims pursuant to 43 CFR 1852 (1970), now codified as 43 CFR 4.451-1. This regulation provides that "[t]he Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim." These are two distinct procedures with different results, although they are rooted in somewhat similar grounds. The former procedure is utilized to restrict the claimant's use of surface resources of his mining claim prior to patent, without a final determination as to the validity of the claim, as especially provided for by the Act. *Arthur L. Rankin*, 73 I.D. 305 (1966). The latter, however, is employed to determine whether a claim is valid or invalid. *United States v. Carlile*, 67 I.D. 417 (1960). This determination is essential when a claimant raises the issue by filing a patent application, as appellant has done, although the determination may be made in the absence of such an application simply to remove any cloud from the Government's title. The power to initiate a contest "that valid claims may be recognized, invalid ones eliminated, and the rights

of the public preserved," requires no specific benefit or designated use by the United States of public lands involved. *Davis v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964), citing *Cameron v. United States*, 252 U.S. 450, 460 (1920).²

Appellant avers in this appeal that delay by the Government in contesting his application for patent was unreasonable and prejudicial. He alleges that his advanced age, financial situation, and an alleged loss of evidence prevented him from properly presenting his case. The record shows that his patent application was filed in 1961 (Tr. [transcript page] 14), that a delay of three years was occasioned by an adverse claimant's suit (Tr. 35), and that in 1965 another delay occurred when Climax Corporation took an option on the claims, which was only released in the fall of 1967 (Tr. 36). Appellant states that the contested claims are located about timberline at approximately 8,500 feet elevation in a heavy snow area, and he requested on April 30, 1970, that a hearing not be set before July 1st of that year due to the inaccessibility of the claims until the middle of June. The delay in this proceeding is unfortunate, but was occasioned by the foregoing circumstances. There is nothing to substantiate appellant's contention of prejudice because of the delay.

² Appellant also asserted that the policy of the Forest Service is to contest all applications for patent. It is not within the province of this Board to question such asserted Forest Service policy or practice, but only to determine the merits of the case before us.

Appellant seeks title to the public lands involved here. He contends that the length of time the claims have been held and the amount of money expended on them should be considered. The requirement of discovery of a valuable mineral deposit is the basis for disposal of the public lands in question here. The Administrative Law Judge correctly stated the law when he referred to the "prudent man rule" as set forth in *Castle v. Womble*, 19 L.D. 455 (1894); *Chrisman v. Miller*, 197 U.S. 313, 323 (1905); *Cameron v. United States*, *supra*; and *Best v. Humboldt Placer Mining Company*, 371 U.S. 334, 335-36 (1963). In this contest proceeding the Government has borne an initial burden of establishing *prima facie* that the mining claims are invalid, but the contestee has the ultimate burden of proof to show by a preponderance of the evidence, that "* * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." *Castle v. Womble*, *supra* at 457; *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States v. Calla Mortenson, et al.*, 7 IBLA 123 (1972); *United States v. Ray Guthrie, et al.*, 5 IBLA 303 (1972).

Any delay in contesting this claim cannot serve as a substitute for a valid discovery. Delays may work to the advantage of a mining claimant as much as to the Government. The mere fact claims have been held for many years before a patent

application is filed lends no support to a contention the claim is valid, and cannot serve as a substitute for evidence of a discovery. *United States v. Harold Dale*, A-30465 (January 20, 1966). See also *Marvel Mining Co. v. Sinclair Oil and Gas Co., et al.*, *United States v. Marvel Mining Co.*, 75 I.D. 407, 423 (1968), holding that any initial failure to contest a mining claim when a patent application is filed does not bar further inquiry into the validity of a claim, where on further review of the case, it appears there is no discovery. Unless there is some question of land status involved, such as an intervening withdrawal, necessitating validity of the claim prior to the withdrawal, the validity of a mining claim must be determined at the time the claim is challenged at a hearing. *United States v. Estate of Alvis F. Denison*, 76 I.D. 233 (1969).

Appellant's next major contention is that the Government's evidence was obtained in secret and introduced as a surprise at the hearing. He alleges that samples were taken without his knowledge, and that assays and laboratory mill tests were made which the Government refused to divulge to him prior to the hearing. Appellant was present in 1961 when Government mineral examiners examined the claims and took samples on each of the five claims (Tr. 35). In 1965 after the adverse suit was dismissed, a further examination was made to update the previous examination (Tr. 36). In 1968 appellant and his son

were present during the examination conducted to determine what work the Climax Corporation had done on the claims (Tr. 36). He was not present in 1970 when further examination and sampling were performed by the Government examiners to ascertain whether further work had been done (Tr. 36). We see no prejudice in this case by the failure to notify appellant of the 1970 examination. Appellant did accompany the Examiners on two of their inspections. Further inspection was merely to determine if additional work had been done. At the hearing appellant had the opportunity to cross-examine them as witnesses concerning their examination. We believe it is preferable for the Government Examiners to notify a contestee before an examination of his claim, but the failure to do so here does not justify any change in the essential determination of discovery. From the number of samples and the methods of testing there is no showing that the Government's sampling was unfair or unrepresentative. Indeed, the extensiveness of the sampling would indicate the opposite.

As for appellant's charge of unfair surprise; *i.e.*, that assays and mill tests were not available prior to the hearing, the record shows that he abandoned this objection. At the beginning of the hearing contestee moved that the Government be required to disclose fully all its assays and information and that the hearing be continued for a year so that the claimant could prepare evi-

dence. The Administrative Law Judge denied this motion but stated:

I will receive all the evidence of the Forest Service, and the evidence of the contestee, after which I will give consideration to a request from you for additional time in which to meet the Government's evidence (Tr. 7).

The contestee made no such request and instead now alleges that he was unfairly surprised. He has not shown that he has been prejudiced. The decision in this case is based solely on the evidence presented at the hearing. The assays and report of a mill test were introduced into evidence and the mineral examiner who obtained the samples was a witness as to the identity of the samples assayed, the manner in which they were taken, and the locations from which they were obtained. The contestee had the opportunity to cross-examine the witnesses. In any event, he cannot reinstate an allegation of unfair surprise in an appeal to this Board when he failed to request additional time to obviate such surprise after all evidence was presented at the hearing. His failure to make the request at the conclusion of the hearing, as suggested by the Judge, constitutes a waiver of his original objection. *Cf. Foster v. Seaton, supra*, at 837; *Adams v. Witmer*, 271 F. 2d 29, 36 (9th Cir. 1959).

As to his contention that there has been a valid discovery, appellant emphasizes that adjacent claims have been patented and that allegedly valuable ore extends into the

contested claims. He asserts that the general mineral geology of the area, the presence of a known fault zone, and the inherent value of the minerals sampled by the Government's witness show that there has been a valid discovery.

We cannot agree. Upon reviewing all of the evidence presented at the hearing we sustain the Judge's findings. It is not essential to discuss the evidence in detail, as the Judge has done so. The adjacent patented claims have not been mined to any extent. In any event, proximity to a discovery on an adjacent claim cannot substitute for a discovery upon the claim itself, nor can deductions from known geological facts where an actual ore body is not exposed, or if exposed, no quantity is shown. *United States v. Kenneth O. Watkins and Harold E. L. Barton*, A-30659 (October 19, 1967). As the Administrative Law Judge found, two assays introduced by contestee were of samples from claims not involved in this proceeding (Tr. 253); another assay was defective (Exhibit C-13) because no evidence was presented as to which claim the sample came from, and a tabulation of assays prepared by contestee, which included a sample for the Perfect Day lode claim, was not supported by any evidence which showed how the sample was obtained or where it was taken. While geological inferences may be sufficient to establish the mineral character of an area, there must be a physical exposure within the

limits of a claim of a body of mineral of sufficient value to warrant a prudent man to develop a mine. *Id.* Evidence of the cost of extraction and transportation is considered "as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means." *Converse v. Udall*, 399 F. 2d 616, 622 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *United States v. Albert B. Bartlett*, 78 I.D. 173, 178 (1971). Despite appellant's contentions with respect to certain costs in connection with the mining operation, he did not produce evidence which would establish that the expected returns from the sale of minerals from the claims would be greater than expected costs.

Appellant also contends that assays introduced by the Government were merely of surface samples, and that mineralization of sufficient quantity existed at depth, because "surface value warrants further development at depth." He has shown no evidence that the values do occur at depth. A prudent man "would drill to ascertain whether values exist at depth. If they do exist he would then proceed to development on the basis of that showing." *Henault Mining Company v. Tysk*, 419 F. 2d 766, 769 (9th Cir. 1969), *cert. denied*, 398 U.S. 950 (1970). It is not incumbent upon the Government to do the drilling to prove or disprove the existence of minerals at depth

where the claimant has not done so. It is well established that Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant, as they simply verify whether a discovery has been made. They do not perform the discovery work for the claimant. *United States v. Ray Guthrie, et al.*, 5 IBLA 303 (1972); *United States v. Delbert G. Oxford, Dorothy M. Oxford*, 4 IBLA 236 (1972); *United States v. Herbert H. Mullin, Pearl F. Mullin, C. A. Gussman*, 2 IBLA 133 (1971); *United States v. Wayne Winters (d/b/a Piedras Del Sol Mining Co.)*, 2 IBLA 329, 78 I.D. 193 (1971).

Appellant asserts that the land should be patented as its highest and best use is "to consolidate the patented land and protect the patented land against encroachment of outside location" and also to put the land on the tax rolls. He also asserts he has not been able to afford the expense of hiring mining engineers and of having tests performed. These assertions do not establish a basis for issuing a patent. The mining law is not simply a vehicle for transferring federal lands to private owners so that they may consolidate their ownership in an area. Its purpose is to promote mineral development of the land. The discovery of a valuable mineral deposit provides the incentive for development of a mine and the reward of a patent. Even though expensive capital investment may be necessary

for a claimant to establish the fact of discovery, this is no excuse or substitute for failure to prove the existence of the valuable mineral deposit to entitle the claimant to a mineral patent. With respect to a somewhat similar contention concerning the difficulty of making a capital outlay to establish the existence of the minerals at depth, the United States Court of Appeals for the Ninth Circuit has stated in *Henault Mining Company v. Tysk, supra*:

* * * It [the mining claimant] wishes, as further incentive, what is tantamount to a guarantee of patentability—an assurance in advance that win or lose in its search for mineral values it will get its fee title. Public land cannot be dispensed on such a basis. * * *

In short, the reliable evidence in this case showed only insignificant values of gold, silver, molybdenum, tungsten and certain other minerals within some of the claims. The Government established a prima facie case of a lack of discovery. Evidence submitted by the contestee was insufficient to rebut the Government's case and to establish positively that there had been a discovery of a valuable mineral deposit within each claim as necessary to sustain the validity of the claim. We have considered all of appellant's contentions but must conclude that they afford no reason sufficient to justify any change in the findings and conclusions reached by the Judge below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

December 8, 1972

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON, *Member*.

WE CONCUR:

JOSEPH W. GOSS, *Member*.

MARTIN RITVO, *Member*.

UNITED STATES

v.

LLOYD O'CALLAGHAN, SR. ET AL.

8 IBLA 324

Decided December 8, 1972

Appeal from decision (California Con- tests No. R-04844 and R-04845) of Administrative Law Judge¹ Graydon E. Holt, declaring the Coyote Clay No. 3 and Coyote Clay No. 4, and the Bolsa De Oro No. 5 placer mining claims null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Generally

The Board will uphold the conclusion of an Administrative Law Judge that where a placer mining claim, located after July 23, 1955, contains common varieties of sand, gravel, and clay and also deposits of metalliferous minerals including gold, silver, and mercury, the locatable minerals must support a discovery without consideration of the economic value of nonlocatable deposits.

¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

Mining Claims: Discovery: Generally

A clay deposit is not locatable under the mining laws, though sold for use as an additive in cattle feed, where it is not shown that the clay possesses characteristics which give it an unusual value distinguishing it from common clays.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Marketability

Since Congress withdrew common varieties of sand and gravel from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. sec. 611 (1970), it is incumbent upon one who located a claim prior thereto to show that all the requirements for a discovery—including that the materials could have been extracted, removed, and marketed at a profit—had been met by that date.

Mining Claims: Common Varieties of Minerals: Unique Property

A deposit of sand and gravel, without a unique property which gives it a special value, cannot be determined to be an uncommon variety solely on the basis of its location, even though the location gives the deposit an economic advantage due to its proximity to market.

Mining Claims: Discovery: Marketability

The fact that nothing is done toward the development of a mining claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them.

Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim.

December 8, 1972

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JOAN B. THOMPSON, *Member*.

WE CONCUR:

JOSEPH W. GOSS, *Member*.

MARTIN RITVO, *Member*.

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¹ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

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Mining Claims: Discovery: Marketability

The fact that nothing is done toward the development of a mining claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them.

Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim.

Mining Claims: Contests—Rules of Practice: Hearings

Appellant's request for an opportunity to obtain new evidence for a further hearing in a mining claim contest will be denied where there has been no tender of proof which would tend to establish a valid discovery.

APPEARANCES: Wien, Thorpe and Sutherland of El Centro, California, by Lowell F. Sutherland, Esq., for appellants; George H. Wheatley, Esq., Office of the Solicitor, Department of the Interior for the United States.

*OPINION BY MR. GOSS**INTERIOR BOARD OF LAND APPEALS*

Lloyd O'Callaghan, Sr., William H. Raley, Lenore O'Connor, the Estate of Ross O'Callaghan, and Lowell F. Sutherland have appealed from a decision of an Administrative Law Judge dated January 23, 1971, declaring the Coyote Clay No. 3, and Coyote Clay No. 4, and the Bolsa De Oro No. 5 placer mining claims, situated in secs. 14 and 15, T. 16 S., R. 9 E., S.B.M., Imperial County, California, null and void.

Contest proceedings were originally initiated by the Riverside Land Office Manager, March 11, 1964, charging that: (a) the material found within the limits of the claim is not a valuable mineral deposit under section 3 of the Act of July 23, 1955, 30 U.S.C. sec. 611 (1970); (b) valuable minerals have not been found within the limits of the claim so as to constitute a valid

discovery within the meaning of the mining law.

A hearing, originally begun in El Centro, California, March 23, 1967, was recessed to permit the parties to secure additional joint samples of mercury from the claims, and was subsequently reconvened April 9, 1970. After evidence was received and testimony given on behalf of all parties, the Judge issued his decision declaring the three placer mining claims null and void for the lack of a timely discovery of a locatable mineral deposit. He found (1) that the sand and gravel deposit on all three claims is a common variety which was excluded from location under the mining laws on July 23, 1955; (2) on the two Coyote claims located after that date the sand and gravel therefore cannot be considered as a locatable mineral; (3) the tertiary clays found on the claims are common clays not subject to location under the mining laws; and (4) there has not been a discovery of a valuable gold, silver or mercury deposit on any of the claims.

Appellants challenged the findings, raising on appeal essentially the same arguments which were discussed at length in the Judge's decision.

We have reviewed the record and considered the decision of the Judge, which summarizes the evidence and discusses in detail the points raised by appellants. The facts of the case and the discussion of the applicable law are set forth in the decision below, a copy

December 8, 1972

of which is attached. We conclude that the Judge's decision and findings are correct. Accordingly, we adopt the decision as the decision of this Board. Several points raised on appeal require additional comment.

As to the sand and gravel on Coyote Nos. 3 and 4, in effect appellants contend that sand and gravel used for road construction purposes is not a common variety under the Act of July 23, 1955. It has not, however, been shown that the material has any unique property giving it a special value. The fact that it meets ordinary construction requirements does not make it unique. A deposit of otherwise common sand and gravel in an area where assertedly good quality sand and gravel is scarce does not make it an "uncommon variety," since scarcity is not a unique property inherent in the deposit but is only an extrinsic factor. *United States v. Neil Stewart*, 5 IBLA 39, 79 I.D. 27 (1972).

Appellants further contend that the Judge erred in applying the requirements of the Act of July 23, 1955, *supra*, to the Bolsa De Oro No. 5 claim, since he found that the claim was located prior to the date of that Act. We find no merit in this argument.

It is incumbent upon one who asserts location of a claim for common varieties of sand and gravel prior to July 23, 1955, to prove by a preponderance of evidence that all the requirements for a discovery—including that the materials could have been extracted, removed, and marketed at a profit—had been met

by that date. *Palmer v. Dredge Corporation*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969); *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971). No such evidence was introduced as to the Bolsa De Oro, nor was evidence presented as to any attempted development. In *United States v. Neil Stewart*, *supra*, 79 I.D. 33-35, the presumption of non-marketability is discussed:

An actual history of development of a claim prior to July 23, 1955, is not essential in order to meet the requirement of marketability. * * *

As we pointed out in *United States v. E. A. Barrows*, *supra* [76 I.D. 299 (1969), *aff'd*, 447 F.2d 80 (9th Cir. 1971)] at 306:

* * * [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. See *United States v. Everett Foster, et al.*, 65 I.D. 1 (1958), *affirmed in Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); * * *

* * * * *

We find that the appellant's evidence is insufficient to establish that the material from his claims could have been marketed at a profit prior to July 23, 1955. The appellant has failed to prove the existence of a demand for the material as of that date *from these claims*. (Italics supplied.)

* * * * *

The Department has already held that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim. * * *

A discovery of a valuable sand and gravel deposit on the Bolsa De Oro claim prior to July 23, 1955, was not proved. After that date, the sand and gravel on the claim was properly classed as a common variety excluded from location under the mining laws.

As to the clay deposits on the three claims, ordinary clay does not warrant that the land be classified as mineral. *Dunluce Placer Mine*, 6 L.D. 761 (1888). Neither is ordinary clay locatable. *Holman, et al. v. State of Utah*, 41 L.D. 314 (1912). The status of common clay was not changed by the Act of July 23, 1955. Appellants herein have not shown what elements make the clay distinguishable from other common clays. Dr. Verne Medel testified that the exact minerals which were of value as an additive in cattle feed were not known, but that certain montmorillonite clay was of value. Montmorillonite is one of the most common of the types of clay. See the definition of "clay mineral" in U.S. BUREAU OF MINES DICTIONARY OF MINING MINERAL AND RELATED TERMS (1968 ed. at page 215):

clay mineral. *** The most common clay minerals belong to the kaolinite, montmorillonite, attapulgite, and illite (or hydromica) groups. ***

It has not been shown what the difference is, if any, between the clay herein concerned and common montmorillonite. The clay found on the claims differs from that used in Dr. Medel's experiments. Appellant O'Callaghan testified: (1) that some

of the cattle feeders required that sea shells be mixed with the clay from the claims in order to increase the calcium carbonate; (2) that the royalty received for the clay was \$.50 per ton; (3) that the clay in question did not contain arsenic; and (4) that other clay in the area did. It was not shown that the large quantities of montmorillonite throughout the United States ordinarily contain arsenic, nor does the definition of montmorillonite in the U.S. Bureau of Mines "Dictionary of Mining Mineral and Related Terms," 1968 Edition so indicate.

In *Holman, et al. v. State of Utah, supra*, the question of whether clay was a mineral and subject to location was considered:

It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. * * * The term * * * [mineral] in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws.

The burden of proving the nature and unusual value of the clay is upon

December 11, 1972

the contestees. A clay deposit—though sold for use as an additive in cattle feed—is not locatable under the mining laws where it has not been shown that the clay possesses characteristics which give it an unusual value distinguishing it from common clays, so that it can be marketed profitably for commercial purposes for which common clay cannot be sold. *United States v. Glen S. Gunn, et al.*, 7 IBLA 237, 79 I.D. 588 (1972).

Appellants' motion, to take and submit as new evidence additional samples of mercury to be obtained by deep borings, is denied. To warrant a new hearing, there should be a tender of proof which would tend to establish that there had been a valid discovery. *United States v. Clarence T. Stevens and Mary D. Stevens*, 77 I.D. 97, 105 (1970). Appellants have shown no conclusive reason why evidence of any discovery was not presented at the first hearing. The request on appeal is in effect a request for additional time in which to make their original discovery.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS, *Member*.

WE CONCUR:

FREDERICK FISHMAN, *Member*.

JOAN B. THOMPSON, *Member*.

**ESTATE OF LUCY FEATHERS
(GRACE MEDICINEBIRD, LEFT-
HAND, BITNER, RIDGBY, WHITE
PLUME OR GEARY)**

**DECEASED ARAPAHO OF
OKLAHOMA**

1 IBIA 336

Decided December 11, 1972

Appeal from the decision of Administrative Law Judge John F. Curran, Tulsa, Oklahoma, issued November 19, 1971, denying the appellant's petition for rehearing.

Affirmed.

**130.2 Indian Probate: Appeal: Dis-
missal**

A petition for rehearing which alleges newly discovered evidence as a basis for a rehearing and fails to set out any evidence or any other grounds which would require a rehearing does not meet the requirements of 43 CFR 4.241 and an appeal from the denial of the petitioned rehearing will be dismissed.

**140.0 Indian Probate: Attorneys at
Law: Generally**

Misstatements of law and an erroneous statutory citation in a brief casts doubt on the merits of the appeal and the professional ability of the attorney who filed the brief.

**370.0 Indian Probate: Rehearing:
Generally**

The requirements in 43 CFR 4.241 that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the opportunity to make a judgment as to whether a further hearing is warranted.

370.0 Indian Probate: Rehearing: Generally

An order denying a rehearing is proper when the petition for rehearing alleging newly discovered evidence fails to state the alleged newly discovered evidence and fails to state any other grounds which would require a rehearing and, accordingly, an appeal from the denial will be dismissed.

390.2 Indian Probate: State Law: Applicability to Indian Probate, Testate

The authority of the Secretary of the Interior, under 25 U.S.C. sec. 373, to approve the will of a deceased Indian when it disposes of trust or restricted property is not subject to state law requirements provided the will is executed in accordance with regulations approved by the Secretary.

APPEARANCES: M. Kirshan Rao, for appellant; Herbert A. Becker, for respondent

OPINION BY MR. HARRIS

INTERIOR BOARD OF INDIAN APPEALS

The testatrix, Lucy Feathers, a/k/a Grace Medicinebird, Left-hand, Bitner, Ridgby, White Plume or Geary, was an unallotted member of the Arapaho Tribe on the Cheyenne Arapaho Reservation of Oklahoma. She died testate on December 27, 1968, and her Will disposing of her trust or restricted estate was approved by an order entered by Judge Curran on June 22, 1972. The testatrix's daughter, Anna Lefthand Burns, filed a petition for rehearing on August 20, 1971, the full text of which follows:

I am hereby requesting a re-hearing of the will of my Mother, Lucy Feathers,

deceased 27 December 1969, and from the ruling of the hearing examiner on 22 June 1971, for the following reasons:

1. I was not represented by legal council and therefore did not understand all the proceedings.

2. I have newly discovered evidence to present at the next hearing. Statement attached.

Two signed statements of identical form were attached to the petition:

The undersigned will appear in behalf of Anna Burns, of Geary, Oklahoma, for the purpose of giving testimony at a hearing of the will of Lucy Feathers, deceased.

In an order dated November 19, 1971, Judge Curran made findings that: the petitioner had appeared and testified in two hearings on this case and appeared to be an intelligent person capable of representing herself; that the petition did not meet the requirements of 43 CFR 4.241(a) on newly discovered evidence; that the petition did not set forth any errors of law or fact. Judge Curran then denied a rehearing.

The Judge who presides over a hearing is in a unique position with respect to evaluating witnesses and their testimony, since only he can observe their manner and demeanor as they testify. In this probate proceeding there were two hearings before a final decision. Examiner Blaine on August 7, 1969, conducted the first, but since he was not available thereafter, Judge Curran conducted a second hearing *de novo* on February 25, 1971, and entered the decision. Appellant appeared, after notice of hearing, at both hearings. She had ample opportunity to obtain counsel or to register any lack

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of understanding—instead she testified fully at both hearings while representing herself and for these reasons Judge Curran's evaluation of the appellant's ability to understand the proceedings before him will not be disturbed.

Title 43 CFR 4.241(a) states, in pertinent part:

[a] * * * petition for rehearing * * * must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. * * *

The specifications in section 4.241 (a) of 43 CFR are for the purpose of requiring the filing of a petition for rehearing which can serve the same function as a motion for a new trial in court. The requirement that the petitioner specifically state the basis of his request provides the petitioner with an opportunity to point out to the presiding officer the nature and extent of any error which may have occurred in the trial of a matter at the original hearing. It also permits one who contends he has discovered new evidence to describe that evidence. Compliance with these requirements is necessary so that the presiding officer may make a judgment as to whether there is in fact any material error in the original proceedings and whether such evidence is truly new

or relevant and material or of sufficient weight to cause a possible change in the decision previously rendered. Noncompliance with the provisions of this section subjects the petition to dismissal for that reason alone. *Estate of Ralyen or Rabyea Voorhees*, 1 IBIA 62 (1971), *Estate of Moses Neaman*, IA-146 (October 28, 1954).

The petition for rehearing submitted by appellant, when examined in the light of 43 CFR 4.241 (a) discloses that it, together with the attached statements, does not conform to the requirements contained in the regulation. The two statements obviously do not set out any newly discovered evidence, or any evidence at all. One of the signers has testified at both previous hearings. The petition itself alleges no impropriety at the two previous hearings, nor even a disagreement with the decision on June 22, 1971. In short, the petition shows no basis for granting a rehearing and Judge Curran's denial of a rehearing is hereby affirmed as proper.

Appellant, by her attorney, M. Kishan Rao, filed a petition on appeal in which it is urged that the testatrix had lost her memory, was at times out of touch with reality, and was incompetent to make a will. The question of testatrix's lack of competence to make a will on these grounds was thoroughly explored at both hearings and included in the decision approving the will was a finding that she was competent to make a will. Since appellant gives

no new evidentiary basis for reconsidering that decision, the Judge's order denying a rehearing will be affirmed and the appeal dismissed.

Mr. Rao also filed a brief in the appeal on behalf of his client. In the brief it is stated:

The will of a full blood Indian must be executed under all the formalities and requirements of State Statute Law.

The authority for that statement is given as:

U.S.C.A. Title 25, sec. 383, Page 449, Paragraph Five (5).

The Board takes notice that the brief includes an erroneous citation to an inapplicable statute and a misstatement of law. An examination of 25 U.S.C.A. reveals that page 449 contains no statutory law. Section 383, found on page 488 of 25 U.S.C.A., pertains to the assessment of cost of surveys, plans, and reports against new irrigation projects. We can only assume that the citation intended was to 25 U.S.C.A. sec. 373 which pertains to wills of Indians disposing of trust or restricted property, but no such language is found in sec. 373. The misstatement of statute law and erroneous citation of a statute by an attorney in an apparent effort to confuse and distract the judicial process is reprehensible and will not be tolerated. Moreover, it creates a doubt as to the merits of the appeal and the attorney's professional ability.

Misstatements and inaccurate citation aside, Appellant is now for the first time arguing that the testa-

trix's will was not executed in accordance with the law of the State of Oklahoma and is therefore invalid. This argument is without merit.

The authority to approve Indian wills which dispose of trust or allotted lands is set out in 25 U.S.C. sec. 373;

Any person of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior * * *. Act of June 25, 1910, c. 431 § 2, 36 Stat. 856; Act of February 14, 1913, c. 55, 37 Stat. 628.

Since 1910, the Secretary, or his delegate—currently the Administrative Law Judge and this Board—has exercised this authority with the approval of the courts. *Bond v. U.S.*, 181 F. 613 (9th Cir. 1910), *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

Since Congress has conferred jurisdiction on the Department of the Interior under 25 U.S.C. sec. 373 to probate the restricted estates of Indians, states may not interfere in any way with this jurisdiction. *Estate of Laverne Wagon*, A-24459 (December 17, 1946). An Indian may by will freely dispose of such

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estates provided his will is executed in accordance with regulations and approved by the Secretary. *Hansen v. Hoffman, et al.*, 113 F.2d 780 (10th Cir. 1940).

43 CFR Part 4, Subpart D—Special Rules Applicable to Proceedings in Indian Probate, Including Hearings and Appeals, section 4.260 (c) provides:

* * * [no] will that is subject to the regulations of this subpart shall be deemed to be revoked by operation of the law of any State.

The Will of Lucy Feathers, having been found to be executed in accordance with Departmental regulations and approved by an Administrative Law Judge under the authority of the Secretary as provided in 25 U.S.C. sec. 373, is not subject to the law of any State.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Examiner's decision denying appellant's petition for rehearing is **AFFIRMED**.

This decision is final for the Department.

DANIEL HARRIS, *Member*.

I CONCUR:

JAMES M. DAY, *Member*.

**ESTATE OF FRANK JONES
(DECEASED FORT PECK
ALLOTTEE)**

1 IBIA 345

Decided December 19, 1972

Appeal from the decision of Administrative Law Judge William Hammett,

Billings, Montana, dated November 16, 1971, denying appellant's petition for rehearing.

Affirmed.

130.2 Indian Probate: Appeal: Dismissal

An appeal from the denial of a rehearing will be dismissed when a petition for rehearing, apparently based on newly discovered evidence, does not allege evidence of sufficient weight to cause a possible change in the original decision.

130.2 Indian Probate: Appeal: Dismissal

A petition for rehearing, apparently based on newly discovered evidence, was properly denied when the petition, by not stating why such evidence was not discovered and presented at prior hearings, failed to comply with 43 CFR 4.241 (a) and an appeal from the denial will be dismissed.

345.0 Indian Probate: Notice of Hearing: Generally

There is a presumption that persons living within the vicinity of the posting places specified in 25 CFR § 15.2 will have notice of hearing because the posting requirements of the section insure such notice is reasonably probable.

370.0 Indian Probate: Rehearing: Generally

The requirements in 43 CFR 4.241(a) that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the opportunity to make a judgment as to whether a further hearing is warranted.

370.0 Indian Probate: Rehearing: Generally

A rehearing was properly denied where a person who lived near a posting place on a reservation which was twice posted in five places with notice of hearing and notice of rehearing respectively, and who, by a mere allegation of lack of notice, fails to meet the burden of proof necessary to overcome the presumption of notice.

APPEARANCES: L. Neil Axtell, for appellant

OPINION BY MR. HARRIS

INTERIOR BOARD OF INDIAN APPEALS

Frank Jones died intestate on May 21, 1966. His wife, Annie Small Jones, whom he married in 1942, had predeceased him in 1954. Five children were born to their marriage. Sybil Jones Scott, the appellant, is one of those children.

Following a probate hearing on October 27, 1966, an Order Determining Heirs was entered by Examiner McKee on March 31, 1967. The heirs of Frank Jones, under the applicable Montana State Law of Intestacy, were determined to be the five surviving children and each was declared eligible to receive one-fifth of the estate.

The estate was reopened and hearing was held on June 19, 1969, to determine if there were additional heirs. Based on the testimony of Catherine Iron Bear Jones that she and Frank Jones had cohabited in 1939 and he had fathered her child, the Secretary of the Interior

on June 29, 1971, issued an Order Determining Heirs after Reopening, and to the five children previously named as heirs, added Manfred Iron Bear Jones as an heir, and determined the share of each to be one-sixth of the estate.

The appellant by her attorney, filed a petition for rehearing on August 27, 1971. As a basis for the requested rehearing the petition set out that Agnes Jones White Hawk, a sister of the deceased, would testify that statements by Catherine Iron Bear Jones that she had lived with Frank Jones and that she was the common law wife of Frank Jones were false. Attached to the petition was the following affidavit:

AGNES JONES WHITE HAWK, being duly sworn on oath, deposes and says: That the testimony given by Cathryn Iron Bear Jones of Poplar, Montana, on the 19th day of June, 1969, at Poplar, Montana, in the estate of Allottee 2818, Frank Jones, to the effect that the said Cathryn Iron Bear Jones was the common law wife of Frank Jones, is entirely false.

Examiner Hammett, by order entered November 16, 1971, denied the requested rehearing on the grounds that, while apparently alleging newly discovered evidence, the petition did not comply with the applicable regulation 43 CFR 4.251, in that it failed to state reasons why the evidence was not discovered and presented at the prior hearings.

The order by Examiner Hammett is the subject of this appeal. Appellant erroneously contends that the record shows notice was sent to her. However, she contends, that it is

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less likely for her to have gotten it in the mail while living on a reservation than in an off reservation community. Therefore, appellant contends, without notice of the hearings she did not appear and present Agnes Jones White Hawk's statement. Solely on the basis of these contentions appellant seeks to have the examiner's order overturned and a second rehearing granted.

It is noted that appellant does not allege error by the Examiner in finding that she was not in compliance with the provisions of 43 CFR 4.251 concerning the form and content of a petition for rehearing, but instead offers a "reason"—lack of notice of hearing—for not discovering or presenting the statement.

With respect to the Notice of Hearing, the then applicable regulation 25 CFR 15.2 states:

Hearings to determine the heirs of deceased Indians or to probate their wills shall be conducted only after notice of the time and place of such hearings shall have been posted for 20 days in five or more conspicuous places on the reservation of which the decedent was a resident or, if the decedent was not a resident of a reservation, in five or more conspicuous places in the vicinity of the proposed place of hearing.

A search of the record on appeal discloses no indication that notice of either the October 1966 or the June 1969 hearing was mailed to anyone. As can be seen from the quoted regulation, no mailing was required.

Appellant has, prior to the first hearing in 1966 and until the present time, lived on the Fort Peck Indian Reservation at Brockton,

Montana. To comply with § 15.2 the notice of hearing was required to be posted on the reservation in five places at the time when the hearing and rehearing were held. The record on appeal contains copies of such notices which reflect posting of the notice of hearing and notice of rehearing at the Fort Peck Indian Agency in Poplar, at appellant's post office in Brockton, at the post offices in Poplar, Wolf Point, and Frazier—all of which are on the Fort Peck Indian Reservation in Montana. All such notices were posted over 20 days prior to the hearing or rehearing in accordance with the above-quoted regulation.

The requirements of the regulation were designed to ensure with reasonable probability that persons interested in the hearing would receive notice of the hearing. The form of the notice of hearing is within the discretion of the Secretary of the Interior, and if such notice meets the above test it satisfies due process of law standards and is sufficient, *Bowling, et al. v. U.S.*, 299 F. 438 (8th Cir. 1924).

When the posting requirements of 25 CFR 15.2 are met, persons living within the vicinity of any place of posting are presumed to have had notice of the hearing. The basis for this presumption is twofold: by compliance with the posting requirements diligent and reasonable efforts have been made to notify all known and unknown claimants against an estate; secondly, trust or restricted estates of deceased Indians primarily involve

title to land and there is a need for finality of decision in such cases in order that reliance may properly be placed on such titles by all concerned. *Estate of Basil Blackburn*, 1 IBIA 261, 79 I.D. 422 (1972), *Estate of Kate Bitner and Rae Bitner*, 1 IBIA 277, 79 I.D. 437 (1972).

As set out above, appellant alleges lack of notice merely because it was less likely for her to receive her mail while living on a reservation than while living off reservation. Already noted is the absence of any requirement to mail a notice of hearing and the fact that none was mailed. Nothing further is offered with respect to the claim of lack of notice. It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack. *Bowling, et al. v. United States*, 299 F. 428, 443. It is clear that appellant, with the above unsupported allegation, has failed to meet its burden of proof and is therefore presumed to have had such notice. On the basis of the foregoing the "reason" supplied by appellant in an effort to comply at this late date with the requirements of 43 CFR 4.251 concerning a petition for rehearing is found to be without merit.

Title 43 CFR 4.241(a) states, in pertinent part:

[a] * * * petition for rehearing * * * must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly-discovered evidence, it shall * * * also state justifi-

able reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. * * *

The purpose of the specifications in Title 43 CFR § 4.241(a) is to require the filing of a petition for rehearing which can serve the same function as a motion for a new trial in court. To require petitioner to specifically state the basis of his request provides him with opportunity to point out to the presiding officer the nature and extent of any error which may have occurred in the trial of a matter at the original hearing. The section also requires one who contends he has discovered new evidence to describe that evidence and give justification for its lack of presentation at any prior hearings. Compliance with these requirements is necessary so that the presiding officer may make a judgment as to whether such evidence is truly new or relevant; whether it is material or of sufficient weight to cause a possible change in the decision previously rendered; and whether there is any justification for failure to present evidence alleged as new, at earlier proceedings. Non-compliance with the provisions of this section subjects the petition to dismissal for that reason alone. *Estate of Lucy Feathers*, 1 IBIA 336, 79 I.D. 693 (1972); *Estate of Ralyen or Rabyea Voorhees*, 1 IBIA 62 (1971). See also *Estate of Moseis Neaman*, IA-146 (October 28, 1954).

An examination of the petition filed by Sybil Scott Jones clearly

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reveals that no challenge is made to the significant finding by the Secretary that Frank Jones was the father of Manfred Iron Bear Jones. All that is challenged is a statement by his mother that she was the common law wife of Frank Jones. No finding on that point was made by the Secretary in his order after reopening. While an examination of appellant's petition leaves unclear whether their challenge to Catherine Iron Bear Jones' status as Frank's common law wife is "newly discovered evidence" it is clear that further evidence on the point is of no value in view of their lack of challenge to paternity of her son, Manfred Iron Bear Jones.

The applicable statute, 25 U.S.C. sec. 371 states:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348, of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall be for such purpose be taken and deemed to be the legitimate issue of the father of such child: * * *

For the purpose of determining descent of land, by its terms sec. 371 applies to Manfred Iron Bear Jones who has been found to be the child of Frank Jones and Catherine Iron Bear Jones. The plain meaning of the words leads to the reasonable conclusion that Congress intended to protect the right to inherit from

the father for both classes of children, those born of parents who cohabited and those born of parents who did not. To this effect see *In Re House*, 11 N.W. 27, 132 Wisc. 212 (1907), *Gray, et al. v. McKnight, et al.*, 183 P. 489, 75 Okla. 268 (1919), Solicitor's Opinion, 58 I.D. 149 (1942), *Estate of Harry Colby*, 69 I.D. 113 (1962), and *Estate of Nelson Drags Wolf*, IA-D-12 (September 19, 1967). Based on the foregoing it is found that appellant's petition for rehearing fails to allege evidence of sufficient weight to cause a possible change in the decision previously rendered.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Examiner's order denying the petition for rehearing is **AFFIRMED**.

This decision is final for the Department.

DANIEL HARRIS, *Member*.

I CONCUR:

JAMES M. DAY, *Member*.

JOHN WILSON &
RONALD RUMMEL

v.

LAUREL SHAFT CONSTRUCTION
COMPANY, INC.

1 IBMA 217

Decided December 19, 1972

Appeal filed by Laurel Shaft Construction Company, Inc., from a decision by

Departmental Hearing Examiner (now Administrative Law Judge) William Fauver reinstating to employment two miners pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Jurisdiction

An independent contractor engaged in the construction of a mine ventilation shaft which is to be used in connection with the extraction of bituminous coal is both an "operator" and a "person" subject to section 110(b)(1)(A) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Burden of Proof

Where the evidence supports findings of fact and inferences that miners were discharged by an operator by reason of the fact that the miners acted in concert to report an alleged danger at a coal mine construction site through the union safety coordinator to a Federal mine inspector, the miners have established a violation of section 110(b)(1)(A) of the Act and are entitled to reinstatement and back pay.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Elements of Proof

A report of an alleged danger at a coal mine instigated by a miner to a union safety coordinator, standing alone, is not sufficient to establish a violation of section 110(b)(1)(A) of the Act.

APPEARANCES: Edward L. Carey, Esq., Willard P. Owens, Esq., Charles L. Widman, Esq., for applicant-appellees, John Wilson and Ronald Rummel;

Lawrence L. Davis, Esq., for respondent-appellant, Laurel Shaft Construction Company, Inc.; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Madison McCulloch, Trial Attorney, for U.S. Bureau of Mines, as amicus curiae.

OPINION BY THE BOARD

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

John Wilson and Ronald Rummel (applicants) were employed by Laurel Shaft Construction Company, Inc. (Laurel Shaft) a Pennsylvania corporation.

On Saturday, August 21, 1971, Laurel Shaft was constructing a return air shaft for the Lancashire No. 24 "B" Seam Mine of the Barnes and Tucker Company, a coal operator, in northwest Pennsylvania. On that date, John Wilson, as crew leader, Ronald Rummel, and three other crew members were removing concrete forms near the bottom of the 273-foot shaft. Due to a series of conflicting hoist signals given by Wilson and Dale Fleming, day superintendent for Laurel Shaft, who was on the surface, a form broke loose and slightly injured two crew members. Wilson ascended to the surface where he argued with Fleming, telling him that if Fleming wanted to run the job from the top of the hole, Wilson would go home before somebody got hurt or killed. Flem-

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ing responded, in substance, "Take your lunch bucket and go home." Wilson then left the site.

On Sunday, August 22, Wilson called Henry Yaskowitz, Safety Coordinator for the United Mine Workers of America (UMWA), District 2, and complained about Superintendent Fleming's dangerous use of the safety signal system. Mr. Yaskowitz on the same day telephoned Federal Bureau of Mines (Bureau) Inspector Benosky, and in the course of the conversation discussed the Wilson-Fleming incident which had occurred at the shaft site.

On Monday, August 23, John Wilson reported for work at the 8 a.m. shift. At that time, according to Wilson's undisputed testimony, John Fleming (Dale Fleming's brother and the "night walker" for the company) advised Wilson that he, Wilson, was penalized one day's work for going home early on Saturday. Later that morning, Safety Coordinator Yaskowitz and Mr. Valerio Scarton, an officer of UMWA District 2, arrived at the site in response to Wilson's Sunday phone call. Wilson told them that he was being penalized one day and repeated his safety complaint against the conduct of Dale Fleming for countermanding the hoist signals.

Yaskowitz, Scarton, and Wilson met with Laurel Shaft's owner, John Trybus, to discuss the incident of the previous Saturday between Fleming and Wilson. Yaskowitz informed Trybus that he was

acting in his capacity as UMWA District Safety Coordinator (transcript of hearing pages 24, 69, hereinafter, "Tr. —"), and that Wilson and Rummel were Mine Safety Committeemen at that site (Tr. 35, 70; Decision of Examiner, page 11, hereinafter "Dec. —"). The men discussed Wilson's one-day penalty, and Trybus told Yaskowitz, Scarton, and Wilson that Wilson could go back to work on Tuesday (Tr. 22, 37, 70; Dec. 11). He further told Scarton that he would consider Wilson's entitlement to four hours of pay for reporting to work on Monday (Tr. 71, 294, 299, 300; Dec. 11).¹ Another meeting was scheduled for Tuesday since Dale Fleming was not present on Monday for the meeting.

Wilson reported to work at 7:30 a.m. on Tuesday, August 24. Dale Fleming confronted Wilson about 8 a.m. and fired him (Tr. 25, 44, 204). By approximately 8:15 a.m., word had spread that Wilson had been fired. Members of the "hoot owl" (or midnight) shift and the day shift agreed that Wilson should not have been fired, and the crews determined not to work until Wilson was reinstated. Ron Rummel, as a messenger, went to Dale Fleming's office to determine whether John Wilson would be returned to work. Fleming's answer was negative.

¹The National Bituminous Coal Wage Agreement to which respondent was a signatory provided at 7, ¶ (m):

"* * * Unless notified not to report, when men report for work at their usual starting time, they shall be entitled to four hours' pay whether or not the operation works the full four hours * * *"

Fleming then talked with the men gathered in the dry hut.² There, Rummel again raised the issue of Wilson's status. After Fleming reaffirmed his position, and the men on the day shift acknowledged that they would not work, Fleming told the men to take their conversation elsewhere.

The men moved to the entrance of the site and were talking there when Henry Yaskowitz and Val Scarton arrived. Yaskowitz and Scarton learned of Wilson's firing and the subsequent work stoppage. A short time later the two union officials, accompanied by John Wilson, met with John Trybus and Dale Fleming. Yaskowitz told Trybus that Federal Bureau inspectors would be there the following morning (Wednesday) unless Wilson was put back to work (Tr. 73).

On Wednesday morning, August 25, 1971, an inspection took place. It was attended by Yaskowitz, Francis Fisanick (the hoist operator) and applicants Wilson and Rummel, together with two Federal Bureau coal mine inspectors (Tr. 76) and Superintendent Fleming. Superintendent Fleming admitted to Bureau Inspector Lewis that he had been giving signals from the top of the shaft on August 21 (Tr. 30, 78, 122, 149).

On Thursday, August 26, Laurel Shaft's owner, Trybus, informed Yaskowitz by telephone that applicant Rummel had been fired (Tr.

81) for inciting a work stoppage on Tuesday, the 24th. Yaskowitz advised Rummel of the discharge by a subsequent phone call the same day. Rummel contended that Henry Yaskowitz' phone call was the first time he knew about being fired (Tr. 131).

Subsequently, a proceeding was brought by John Wilson and Ronald Rummel under section 110(b)³ of the Federal Coal Mine Health and Safety Act of 1969,⁴ for reinstatement to employment with Laurel Shaft Construction Company, Inc., with back pay and costs. A hearing was held before the Hearing Examiner, and a decision was issued on April 19, 1972, granting reinstatement to both applicants and ordering payment of back wages and costs.

A Notice of Appeal was timely filed by Laurel Shaft, and on June 7, 1972, it filed "Objections" to the Examiner's decision, summarized as follows: (1) Laurel Shaft was not

³ Section 110(b) provides: "(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

"(2) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. * * *

⁴ P.L. 91-173; 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² The "dry hut" is a dressing room where the work crews change clothes before and after each shift (Tr. 24).

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an "operator" of a coal mine; (2) notification of a miner's union district safety coordinator of an alleged safety violation does not constitute notification to the Secretary or his authorized representative; and (3) Laurel Shaft did not discharge applicants John Wilson or Ronald Rummel for reporting a safety violation.

Applicant's brief was timely filed and set forth the following contentions: (1) Laurel Shaft is subject to the jurisdiction of the Act; (2) complaint to a UMW A safety coordinator is equivalent to a report to the Secretary under section 110(b) of the Act; and (3) applicants Wilson and Rummel were discharged in violation of section 110(b) (1) (A) of the Act.

The U.S. Bureau of Mines submitted its brief as amicus curiae, urging that the Hearing Examiner properly ruled that Laurel Shaft was an "operator" under section 3(d) of the Act.

Oral argument was held before the Board on July 20, 1972.

Issues Presented for Review

I

Whether the Laurel Shaft Construction Company, Inc., is an "operator" within the definition set forth in section 3(d) of the Act.

II

Whether applicants, Wilson and Rummel, sustained their burden of proving a violation on the part of

Laurel Shaft of section 110(b) (1) (A) of the Act.

III

Whether the following Conclusion of Law No. 3 in the Examiner's decision properly states the law:

An employer's discrimination against a coal miner because the miner has notified his Union District Safety Coordinator of an alleged safety violation or danger at the mine is a violation of section 110(b) (1) (A) of the Act.

I

Is Laurel Shaft an "operator" under section 3(d) of the Act?

Section 3(d) of the Act defines "operator" as follows:

"[O]perator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine;

Section 3(h) of the Act defines "coal mine" as follows:

"[C]oal mine" means an area of land and all structures, facilities, machinery, tools, equipment, *shafts*, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, *or to be used in*, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities; (Italics added).

We find the following facts, clearly established in the record, to be determinative that Laurel Shaft is an operator subject to the Act: (1) Laurel Shaft was performing a contract with the owner of a coal mining enterprise, the Barnes and

Tucker Company, to sink a return-air ventilation shaft to be used in the extraction of bituminous coal for the Lancashire No. 24 "B" Seam Mine in northwest Pennsylvania; (2) Laurel Shaft maintained the entire, exclusive, and independent responsibility and control over the shaft; (3) Laurel Shaft hired members of the International Union, United Mine Workers of America, to construct the shaft and exercised exclusive supervision and control over their work; and (4) Laurel Shaft was signatory to the National Bituminous Coal Wage Agreement and the Construction Work Addendum thereto covering all construction of mine and mine-related facilities, including the sinking of shafts. *See* Examiner's decision, *Centennial Development Co.*, Docket No. NORT 71-95 (November 26, 1971).

We note that this proceeding is brought pursuant to section 110(b) (1) of the Act which subjects to its sanctions any "person"⁵ and does not mention the term "operator." Therefore, we find and conclude that at all times relevant to this proceeding, the respondent was a "person" as well as an "operator" and subject to the respective jurisdictions of the Examiner and this Board for the purpose of adjudicating the alleged violation of section 110(b) (1) (A) of the Act.

II

Did Applicants sustain their burden of proving a violation of section 110(b) (1) (A) of the Act?

We have previously held that the jurisdiction of the Secretary under section 110(b) of the Act is limited and that this section may not " * * be broadened to provide relief for all unfair or unjust labor practices * * ." *Munsey v. Smitty Baker Coal Co., Inc.*, 1 IBMA 144, 158 (1972). We held in that case, to prove a violation of section 110(b) (1) (A) of the Act, it must be established that a miner was discharged and that such discharge was motivated by reason of a report made or instigated by the miner to the Secretary or his authorized representative of an alleged violation or danger in a coal mine. We also stated that the miner need not personally make the report directly to the Secretary or to his authorized representative, provided, the miner instigates or provides the initial impetus for the required report, and provided, he intends that the report ultimately will be made on his behalf to the Secretary or his authorized representative.

In *Munsey* the Examiner granted the application of the miners for reinstatement to employment and back wages. We reversed the Examiner on two principal grounds: first, that applicants failed to prove that the operator had knowledge of any

⁵ Section 3(f) of the Act states, " * * 'person' means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization; * * *."

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report to the Secretary or his authorized representatives which could have motivated the discharge; and second, the evidence established that, assuming a discharge, it was motivated by the refusal of the applicants to work and not by any protected reporting activity on their part.

The facts established here are different. In this case there is sufficient evidence to support the following findings of fact: (1) that applicant Wilson was discharged Tuesday, August 24, 1971, and applicant Rummel was discharged on Thursday, August 26, 1971; (2) that on Sunday, August 22, 1971, Wilson, in good faith, initiated the reporting process by reporting to Henry Yaskowitz, the Union Safety Coordinator, the alleged danger involved in the Saturday incident, who in turn reported the incident to a Bureau coal mine inspector, an authorized representative of the Secretary; (3) that Laurel Shaft was advised of the functions and duties of the Union Safety Coordinator (Tr. 65), including that of acting as liaison between the coal miners and the Bureau for transmitting miners' safety complaints to the Bureau; (4) that Yaskowitz, Wilson, and Scarton met with Trybus on Monday, August 23, 1971, and advised him of the following: (a) that Yaskowitz was present in his capacity as a Union Safety Coordinator, (b) that unsafe conditions were involved at the project in the Saturday incident (Tr. 70-71), and (c) that both Wilson and Rummel were mine safety

committeemen for the construction project; (5) that a spot inspection, in fact, occurred at the shaft on Wednesday, August 25, 1971, at which time both Wilson and Rummel accompanied the Federal inspectors.

In the absence of plausible or credible evidence on the part of the operator establishing reasons, other than as alleged, for the discharges of the applicants, from the foregoing findings of fact and all the circumstances apparent in the record, it is inferred: (1) that Wilson instigated a report to the Secretary's authorized representatives on behalf of himself, Rummel, and other members of his crew who were exposed to the alleged danger on Saturday, August 21, 1971; and (2) that the motivation for the discharges of Wilson and Rummel was the instigation of the report by Wilson and the belief by the operator that Rummel acted in concert with Wilson in instigating such report, since both were Mine Safety Committeemen and accompanied the inspectors on the aforesaid inspection, and both were involved in the incident of Saturday, August 21, 1971.*

Therefore, we hold and conclude that the applicants have met their burden of proof in establishing a violation of section 110(b)(1)(A) of the Act. As we discussed in *Munsey*, *supra* at 161, proof of a violation

* In the *Munsey* case, *supra* at 161, we said that motivation for discharge and knowledge by the operator may frequently be proved only by inference, since evidence of motive and knowledge often will be confined to the mind of the operator.

of section 110(b) (1) often must be based upon inferences properly drawn from established facts of record. Therefore, we stress that the parties in all section 110(b) cases must present convincing evidence as to the circumstances surrounding the discharge or discrimination, and Administrative Law Judges must clearly state the reasons for all findings of fact, and especially findings on credibility.

Credibility of Witnesses—Inferences

The deciding factor in reaching our conclusion is the lack of credibility of the testimony of Laurel Shaft's two witnesses, Fleming and Trybus. Our review of the record shows this testimony to be internally inconsistent, contradictory, and in direct conflict with the testimony of applicants' witnesses. Although the Examiner alluded to a finding of lack of credibility with respect to Laurel Shaft's testimony regarding the discharge of applicant Rummel,⁷ he made no general finding of lack of credibility. In numerous other findings of fact, however, he did reject the testimony of the Laurel Shaft witnesses.⁸

We find the testimony of Laurel Shaft's witnesses in large part to be incapable of belief because of its numerous inconsistencies and con-

tradictions disclosed by the record.⁹ On the other hand, we find the testimony presented by the applicants to be substantially consistent, uncontradictory, and credible when examining all of the facts leading up to the discharge. We think the inferences we draw from the facts of record, insofar as we can understand the record, are warranted in this case and in keeping with our holding in *Munsey*.

III

Does the Language of Conclusion of Law No. 3 in the Decision below Properly State the Law?

Laurel Shaft objects to the Examiner's Conclusion of Law No. 3, which reads as follows:

An employer's discrimination against a coal miner because the miner has notified his Union District Safety Coordinator of an alleged safety violation or danger at the mine is a violation of section 110 (b) (1) (A) of the Act.

We sustain the objection to this conclusion of law. Section 110(b) (1) (A) of the Act does not protect miners from discharge for notifying a union safety coordinator of an alleged violation or danger. The union safety coordinator, unlike the Secretary or his authorized representative, has no legal or statutory duty to enforce compliance with the

⁷ See Finding of Fact 57, Dec. at 14.

⁸ See Further Findings: 58-64, Dec. at 14-15.

⁹ For example, Fleming, the superintendent, testified that applicants incited a strike and interfered with blasting operations in protest of Wilson's discharge, which to the applicants' knowledge had not yet occurred. (Tr. 201-04.) See generally Tr. 169-268.

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Act. For this reason, we stated in *Munsey, supra* at 154, reporting to a union safety coordinator, standing alone, is not enough. The evidence must show that a report was made or was intended to be made to the Secretary or his authorized representative. By extending the statutory provision in his conclusion of law, the Examiner went beyond the scope of the statute and erred.

Although we hold that Conclusion of Law No. 3 misstates the law, the error does not vitiate the result of the Examiner's decision awarding reinstatement and back pay.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Examiner's decision and order of April 19, 1972, IS AFFIRMED and the application IS GRANTED.

C. E. ROGERS, JR., *Chairman.*

DAVID DOANE, *Member.*

JAMES M. DAY, *Ex Officio Member.*

UNITED STATES

v.

HUMBOLDT PLACER MINING
COMPANY

and

DEL DE ROSIER

8 IBLA 407

Decided December 20, 1972

Appeal from decision (California Contest 10-747) of the Office of Appeals

and Hearings, Bureau of Land Management, holding mining claims null and void.

Affirmed.

Mining Claims: Discovery: Marketability—Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Placer Claims

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date.

Mining Claims: Discovery: Marketability

The Government may raise a presumption that the material on mining claims could not be extracted and marketed at a profit by introducing evidence that the claimant has done nothing to develop the claim.

Mining Claims: Contests—Mining Claims: Discovery: Generally

Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.

Rules of Practice: Appeals: Burden of Proof—Contests and Protests: Generally

Where the Government has made a prima facie showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable

mineral deposit sufficient to support a discovery is upon claimant.

Rules of Practice: Evidence

The weight and credibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California; Burton J. Stanley, Esq., Office of the Solicitor, Department of the Interior, Sacramento, California.

OPINION BY MR. FISHMAN INTERIOR BOARD OF LAND APPEALS

The Humboldt Placer Mining Company and Del De Rosier have appealed from a decision dated June 9, 1970, rendered by the Office of Appeals and Hearings, Bureau of Land Management, hereinafter termed the "Bureau decision." That decision affirmed a decision of a Hearing Examiner¹ dated March 6, 1969, which declared the placer mining claims in issue null and void for lack of a discovery of a valuable mineral deposit on any of the claims.

The Humboldt Placer Mining Company is a corporation which was organized in 1896. All of its

mining claims in issue were located prior to 1920. On November 19, 1954, Humboldt filed a patent application for the claims in issue. On June 27, 1957, the United States commenced an action in the District Court to condemn certain property which included the land embraced within the claims in order to construct the Trinity River Dam and Reservoir. After obtaining a writ of possession in the District Court, the United States, on May 15, 1958, instituted a contest proceeding in the local Land Office of the Bureau seeking an administrative determination of the validity of the unpatented mining claims. Humboldt thereupon brought suit to enjoin the administrative proceedings, contending that the proper jurisdiction to determine the validity of the claims was in the courts. The issue of jurisdiction was ultimately decided by the United States Supreme Court in *Best v. Humboldt Placer Mining Company*, 371 U.S. 334 (1963), in which it was held that the issue of the validity of the claims was to be resolved by the Department of Interior. In the interim, contestees prosecuted an appeal to the Secretary of the Interior from a decision rejecting their answer to an amended complaint, and denying their motion to dismiss the complaint. The Secretary reinstated the contest proceedings by decision, *United States v. Humboldt Placer Mining Company and Del De Rosier*, A-30055 (Supp.) (December 16, 1964).

The contestant, the United States, filed a second amended complaint

¹ The United States Civil Service Commission has changed the title "Hearing Examiner" to "Administrative Law Judge." 37 F.R. 16787 (August 17, 1972). Hereinafter that official will be referred to as the "Judge."

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on July 20, 1966, alleging in part as follows:

a. There is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

b. The land embraced within the claim or claims is nonmineral in character.

c. With respect to the public lands in each and all of the mining claims identified in Paragraph III of this Second Amended Complaint, contestant charges separately and collectively that each 10-acre legal subdivision or part thereof is nonmineral in character and therefore should be excluded from the respective alleged mining claims.

d. The Cademartori placer claim, as described in the location notice, embraces incontiguous tracts of land, and is therefore contrary to law.

Contestees answered the second amended complaint generally denying the allegations contained therein. A hearing was held on November 28, 29, 30, and December 1, 1967, and on January 8 and 9, 1968. All parties were represented by counsel at the hearing.

The contested claims are located on the south side of Stuart Fork of the Trinity River, in Trinity County, California, upstream from the recently constructed Trinity Dam. The most significant geological characteristic in the area is the Weaverville Formation with a reported depth where greatest of over 800 feet. It is an old tertiary river channel which has been bisected by streams and has been preserved by the relative uplifting of the older hard and resistant sediments around it. The tertiary gravels are uncon-

solidated, deeply weathered, red-colored clay gravels resulting from volcanic activity and reworking, and which are estimated to be approximately 35 million years old. The claims also expose some recent and present stream gravel, and some ultramafic and granitic intrusive rocks. The bedrock series in the area are the Bragdon Formation (Mississippian), Copley Greenstone (Devonian), and Salmon Schist.

The principal issue on this appeal is whether the evidence presented at the hearing established a discovery of a valuable mineral deposit on any of the claims within the meaning of 30 U.S.C. § 22 (1970). Appellants assert that the evidence supports such a discovery with respect to both gold and gravel on each claim.

A discovery exists "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine * * *." *Castle v. Womble*, 19 L.D. 455, 457 (1894); see *United States v. Coleman*, 390 U.S. 599 (1968).

In applying this rule to the present case, we are of the opinion that the preponderance of the credible evidence fails to support a discovery on any of the claims. Six qualified geologists and engineers testified for appellee. None was called by appellants, and only one geologist testified on behalf of Archibald, a party permitted to intervene in the

hearing.² The assay methods used for the geologist called by Archibald were not explained.

GRAVEL

Common varieties of sand and gravel were withdrawn from location under the mining laws on July 23, 1955. See 30 U.S.C. sec. 611 (1970). Consequently, to satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date. *United States v. Coleman, supra*; *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971); *United States v. Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971).

While the record discloses that gravel was an abundant commodity on the claims (Tr. 250, 344, 957), there is no evidence of any sales of gravel from the deposits. George W. Nielsen, a mining engineer employed by the Bureau of Land Man-

agement and called by appellee, testified that at no time has the Weaverville Formation been mined and processed for the production of sand and gravel (Tr. 960). He further testified that the Weaverville Formation, because of weathering, is generally too dirty and too soft to make concrete aggregate, although it could be used for sub-base and fill material (Tr. 961). Robert Middleton, a mining engineer called by appellee, testified that he examined the claims (Tr. 292), and further testified that no aggregate has been produced from the claims, and that there was no evidence on the ground of any removal (Tr. 354).

This evidence was sufficient to establish a prima facie case that the gravel on the claims could not have been marketed at a profit prior to July 23, 1955. As stated in *United States v. E. A. Barrows and Esther Barrows*, 76 I.D. 299, 306 (1969):

*** [W]hile the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. (Citing cases)

Where, as in the present case, the Government has made a prima facie showing of a lack of a discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimants. *Foster v. Seaton, supra*; *United States v. Wayne Winters, d/b/a Piedras Del Sol Mining Com-*

² J. O. Archibald was allowed to intervene at the hearing and assert an interest in some of the claims under a lease agreement. However, he did not appeal and is no longer a party to the proceedings.

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pany, 2 IBLA 329, 78 I.D. 193 (1971).

In an attempt to meet this burden, appellants called James R. Miller, a marketing consultant, to testify. He expressed an opinion that gravel could have been mined from the claims and removed and disposed of at a profit prior to July 23, 1955 (Tr. 721). However, there is no evidence in the record that Miller was in the Trinity County Area in or prior to 1955; nor was his testimony based upon personal knowledge. *Cf. Verrue v. United States*, 457 F.2d 1202 (9th Cir. 1972). He admitted that he did not examine the sand and gravel on the claims (Tr. 693, 734) and it is apparent from the record that his opinion was based upon conversations with other persons who were not called to testify (Tr. 694, 735) and literature which he studied on the market potential of sand and gravel generally in the State of California and the United States. Moreover, Miller qualified his opinion by conditioning it on the ability to commercially produce gold (T.R. 719, 721), and stated that he was "not prepared to say whether the amount of gold that's been evidenced would be a commercial operation" (Tr. 721).

In expressing his opinion, Miller failed to articulate whether he was referring to gravels of the type which can only be used for fill and similar uses, or whether he was referring to gravels of the type which could be used to make concrete aggregate. The distinction is crucial. In determining the marketability of

materials on a mining claim, sand and gravel which can only be used for fill purposes or for other comparable purposes cannot be considered since such materials have never been locatable under the mining laws. *See United States v. E. A. Barrows and Esther Barrows, supra*, and cases cited therein.

Appellants, in our view, failed to overcome the prima facie case established by the Government. Their evidence was too vague and inconclusive to establish that locatable gravels from the claims in issue could have been extracted and marketed at a profit prior to July 23, 1955. Moreover, appellants have failed to establish by substantial and probative evidence the existence of a demand for the gravel as of that date from these claims. *United States v. William A. McCall, Sr., et al.*, 2 IBLA 64, 78 I.D. 71 (1971).

GOLD

Mining engineers and geologists conducted, on behalf of the contestant, a comprehensive mineral examination on the claims from 1957 to 1961. Samples were taken in accordance with accepted standard procedures by excavating churn drill holes, auger holes, surface channels, pits, and trenches. The samples were taken at points selected by contestant's engineers and at points which contestees had indicated in their patent application the existence of significant mineral values. The samples were assayed in accordance with accepted standard procedures. The record discloses the

following data with respect to each claim:

Ukiah Placer Mining Claim

Three of seven channel and trench samples taken from this claim contained no gold values. (Contestant's Exhibit Q). The remaining four samples contained gold values ranging from .076 to 5.65 cents per cubic yard. An auger hole drilled to a depth of 25 feet revealed gold values of .142 cents per cubic yard.

Covelo Placer Mining Claim

Three of nine channel and trench samples taken from this claim revealed no gold values (Contestant's Exhibit P). The remaining six samples contained gold values ranging from .192 to 1.40 cents per cubic yard. An auger hole 25 feet in depth revealed gold values of .045 cents per cubic yard.

Humboldt Placer Mining Claim

Three channel samples were taken from this claim. Two of the samples contained no gold (Contestant's Exhibit O). The third channel sample contained gold values of .549 cents per cubic yard. An auger hole drilled to a depth of 46 feet revealed gold values of .071 cents per cubic yard. The auger hole was put down on a depositional contact of the Weaver-ville Formation on the Bragdon.

White Placer Mining Claim

Three channel samples taken from present stream gravels on this claim contained gold values ranging from .197 to .688 cents per public yard (Contestant's Exhibit R). Two auger holes, drilled to depths of 17 and 37 feet, revealed respective gold values of .049 and .095 cents per cubic yard.

Tannery Placer Mining Claim

The contestant took four samples from this claim. (Contestant's Exhibit J). A channel sample taken from the exposed Weaverville Formation contained .576 cents gold per cubic yard. An auger hole, 21.8 feet deep, revealed no gold values. Two churn drill holes, each 45 feet deep,

revealed gold values of 1.13 cents and .157 cents per cubic yard.

Furnell Placer Mining Claim

Five of the sixteen samples taken from this claim contained no gold. Six samples ranged from .3 to 1.1 cents per cubic yard. A sample from a channel cut on a slope along a road had a value of 8.3 cents per cubic yard. Four sample shafts were put down in recent gravels along Slate Creek which runs northeasterly through the claim. A sample from a shaft 2.8 feet to bedrock in sec. 3 showed a cubic yard value of 17.4 cents. In sec. 2, a shaft showed the following values per cubic yard: the top 3.2 feet, 1.4 cents; the next 4.7 feet, 42.8 cents; and the last foot in cemented Weaverville bedrock, 2.1 cents. In a third shaft the values per cubic yard were: the first 6 feet, 0.5 cents; the next 1.2 feet, 49 cents; and the last foot in cemented bedrock, 2.1 cents. The sample from the fourth test shaft went down 3.4 feet through to cemented bedrock and had a value of 67 cents per cubic yard. (Contestant's Exhibits D-D, E-E.)

Last Chance Placer Mining Claim

The contestant took 21 samples from this claim (Contestant's Exhibit L), eight surface samples, twelve from churn drill holes ranging from 36 to 100 feet in depth, and one from an auger hole 42 feet in depth. The surface samples contained gold values ranging from .224 to 3.30 cents per cubic yard. The churn drill holes and auger hole revealed gold values ranging from .034 to 1.22 cents per cubic yard. Drill hole number 6, located between Humboldt holes number 13 and 14, drill hole number 7 located on the other side of Humboldt hole number 13, and drill hole number 8 located on the other side of Humboldt hole number 14, revealed gold values ranging from 0 to .156 cents per cubic yard. In each instance, holes were put down within five feet of the Humboldt hole.

Lewis Placer Mining Claim

Twelve channel samples taken from this claim contained gold values rang-

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ing from .02 to 14.48 cents per cubic yard (Contestant's Exhibit N). The sample showing the highest value and the second sample containing 6.21 cents gold per cubic yard were taken from limited occurrences of present stream gravels. A sample of the present Stuart Fork gravels contained gold values of 1.21 cents per cubic yard.

Enough Placer Mining Claim

Eighteen surface samples taken from this claim contained gold values ranging from .052 to 90.58 cents per cubic yard (Contestant's Exhibit M). The gold value shown in nine of those samples was 1.64 cents, or less, per cubic yard. Sample number 8-1 is composed of nine samples taken from recent gravel, gully bottom. The nine samples contained gold values ranging from 6.71 cents to 90.58 cents per cubic yard, with an average value of 33.93 cents per cubic yard. According to the exhibit, "It would be a physical impossibility to have more than 1,200 cubic yards at this value in this gully. The gully is mined out from this point downstream." An auger hole 47 feet deep revealed gold values of .362 cents per cubic yard.

Faurrell Placer Mining Claim

The Faurrell claim embraces two contiguous tracts. Two channel samples taken from the east tract contained gold values of 1.04 cents and 1.56 cents per cubic yard. There was no evidence of prospecting on the west tract. Three channel samples cut from exposures on the west tract contained no significant gold values. (Contestant's Exhibit U.) The concentrates of a number of samples were submitted for fire assay (Contestant's Exhibit G). The sample showing the greatest value, \$683.20 per ton of concentrate, had a 15,900 to 1 ratio of concentration. The value of the black sand concentrate reflected the similar inconsequential values when related back to the value of the black sand per cubic yard of gravel and clay.

Tannery No. 2 Placer Mining Claim

Twenty-five channel and trench samples, taken from present and recent stream gravels, contained gold values ranging from .132 cents to 22.82 cents per cubic yard (Contestant's Exhibit F). A churn drill hole, 35 feet in depth, revealed gold values of 4.26 cents per cubic yard. Two auger holes, 24 and 25 feet in depth, revealed respective gold values of .076 and .308 cents per cubic yard.

Jackson Placer Mining Claim

Eight samples taken from this claim showed gold values ranging from 0.5 to 34.8 cents per cubic yard. The next highest value was 8.5 cents per cubic yard. The highest value came from a test shaft put down by the mineral examiner in recent gravels of Slate Creek. (Contestant's Exhibit D-D, E-E.)

Cademartori Placer Mining Claim

The claim embraced two incontiguous tracts. One of the tracts was abandoned by contestees at the hearing. In the retained portion of the claim three samples have been taken. A channel cut in an eight-foot bank of weathered Weaver-ville Formation contained gold values of .8 cents per cubic yard. A pit sample from a gully in Irish Gulch revealed gold values of 1.2 cents per cubic yard. A channel sample along an old ditch showed nil (Contestant's Exhibits D-D and E-E, Tr. 460-461 and 470-471).

The average gold values on the undisturbed Weaver-ville Formation which was exposed on the claims was .276 cents per cubic yard. The material exposed in the slopes and washes had an average gold value of 1.863 cents per cubic yard. The gully samples averaged 2.56 cents per cubic yard, and the recent stream gravels averaged 8.72 cents per cubic yard.

The mining engineers and geologists called by contestant testified to the effect that as a result of their examinations of the claims, they were of the opinion that none could

be developed as valuable mines (Evans, Tr. 177; Middleton, Tr. 310; Scarfe, Tr. 478-480; Erich, Tr. 595, 640).

In light of this evidence, we conclude that the contestant established a prima facie case that no discovery existed on any of the claims. After a careful consideration of the record, we are of the opinion that the contestees have failed to meet their risk of non-persuasion in establishing by a preponderance of evidence that the claims are valid. *Of. Foster v. Seaton, supra; United States v. Neil Stewart*, 5 IBLA 39, 79 I.D. 27 (1972).

Appellants have raised eighteen contentions of error in their brief on appeal. The principal claims of error raised by appellants have been considered above. The remaining claims of error, which largely relate to alleged procedural irregularities or criticisms of the Government's case in chief, will be considered in their order of appearance in appellants' brief.

I.

Appellants first argue that the second amended complaint is defective because it fails to allege the critical date when a discovery must be made and it fails to allege a lack of market for gravel. It should be noted that appellants made no objection with respect to this issue prior to or at the hearing.

The law is well settled that discovery must be shown to have been made at the latest as of the time a

claim is challenged. *United States v. Margherita Logomarcini*, 60 I.D. 371 (1949). Contestees were well aware of the law in this regard. See *Best v. Humboldt Placer Mining Company, supra*. It is also well settled that in order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel it must be shown that prior to July 23, 1955, the materials could have been extracted, removed and marketed at a profit. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit. *United States v. Neil Stewart, supra*. Inherent in the language of the second amended complaint is the charge that there had been no discovery of valuable minerals subject to location. The presentation of their case was in no way prejudiced by the failure of the second amended complaint to allege the critical date.

Contestees' position that the complaint should be dismissed for failing to allege a lack of market for gravel is untenable. In support of their position they rely upon an instruction in the Bureau of Land Management Manual.³ It provides in relevant part as follows:

1. Marketability of common place minerals.

³ Bureau of Land Management Manual, Vol. VI, Part 5, Chapter 5.2. (August 1, 1958).

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23. For claims located before July 23, 1955, for common place minerals where no actual market exists, the proper charges are:

(2) no discovery of a valuable mineral has been made within the limits of the claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for those materials.

Manual instructions which are issued for administrative purposes only, are neither published nor binding upon the public, and ordinarily, no one other than Bureau employees is expected to use the Manual. *Barbara Rubenstein*, A-28508 (December 28, 1960). Moreover, a charge of lack of discovery encompasses within its ambit a lack of a market for the mineral.

The record discloses that the patent applications did not specifically state that location was for gravel, and while it is not essential to identify each specific mineral claimed to be valuable in a patent application, the failure to mention gravel or any other commonplace materials in the patent application would account for the absence of an allegation regarding the lack of discovery by July 23, 1955, and the corollary market for gravel in the instant case. In any event, it is apparent from the record that both parties directed their proof to the issue of marketability in connection with gravel. The first witness called by contestees was called as an expert to express an opinion on the marketability of gravel. Contestant also called an expert witness to rebut the evidence regarding the market-

ability of gravel put on by the contestees.

Contestees, we conclude, were reasonably apprised of the issues in controversy and there is no showing that they were misled in any respect. Under such circumstances the notice provided by the complaint is adequate. See *United States v. Independent Quick Silver Co.*, 72 I.D. 367 (1965), and authorities cited therein.

II.

Contestees next argue that the complaint should be dismissed because contestant failed to comply with an order for the production of documents. While contestees did not raise this argument in their appeal to the Bureau, they did claim at the hearing that contestant had not fully complied with the order.

The same Judge who issued the order for production of documents ruled that contestant substantially complied with the order, and we perceive no error in this ruling. The record discloses that counsel for contestees was given ample opportunity to inspect documents which he claimed were not produced (Tr. 22). It is also apparent from the record that some of the information contained in documents which contestees claim were not produced was turned over to counsel for contestees in what is referred to as the "Frenzell Report" (Tr. 19). Other documents not produced did not relate to the mineral examination made by the contestant (Tr. 19-20). Upon a review of the record we are of

the opinion that those documents which were not produced prior to the hearing were not necessary to the preparation of contestees' case, and under such circumstances, failure to produce does not constitute error. *See Mrs. R. W. Hooper*, 3 IBLA 330 (1971).

III.

Contestees next argue that the Director's decision cannot stand because the record fails to show that the Director ruled on each assignment of error and failed to adopt each requested finding presented. In support of their petition, contestees rely on the Administrative Procedure Act, sec. 8; 5 U.S.C. sec. 557 (1970). Section 557(c) provides an opportunity for parties to submit proposed findings and conclusions for consideration before an initial decision is made. The record clearly shows that this provision of the Act was complied with in every respect. The Judge ruled on each requested finding. He adopted 38 of those findings and rejected the remainder, stating his reasons therefor in each instance. It is implicit in the decision of the Bureau that it agreed with the Judge with respect to his findings and conclusions, at least insofar as they were material and relevant to deciding the ultimate issues in the case.

The assignments of error made by contestees on appeal from the decision of the Judge related, almost entirely, to asserted errors committed by the Judge in making the findings and conclusions in the case,

or failing to make certain findings or conclusions requested by contestees.

While the Bureau decision did not consider each assignment of error separately, it gave adequate consideration to the exceptions presented. The Act does not require detailed or numbered findings on every subsidiary evidentiary fact. *See NLRB v. Sharples Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954). Furthermore, a separate finding need not be made on exception to a Judge's report. *See* 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 16.02 at 438 (1958); *cf. United States v. Chas. Pfizer & Co., Inc.*, 76 I.D. 331, 352 (1969).

IV.

Contestees next argue that the ultimate finding of nondiscovery with respect to the mining claims is erroneous because it is not supported by evidentiary facts. Contestees cite several cases in support of the proposition that evidentiary facts are necessary to prove ultimate facts (a proposition with which no one takes issue) but refer to no evidentiary facts in the record to support an ultimate conclusion of discovery. We are of the opinion that the ultimate fact of nondiscovery is amply supported by the evidence, with respect to each claim.

V.

Contestees next argue that it is error to require more than one discovery to be made in order to sup-

port an association placer claim. They cite several cases in support of the proposition that only one discovery is required to support the validity of an association placer claim, again a proposition with which no one takes issue. In answer to the alleged error, we only point out that no requirement beyond the showing of "a discovery" with respect to each of the association claims was imposed on the contestees.

VI.

Contestees next argue that the Government's gold placer samples were invalid because the samples were not taken to the bedrock. We disagree.

Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. *United States v. Jimmie (Juanita) P. Laing*, 3 IBLA 108 (1971). See *United States v. Lawrence W. Stevens, et al.*, 76 I.D. 56 (1969); *United States v. Coaton*, A-30835 (February 23, 1968); *United States v. Bryan Gold*, A-30990 (May 7, 1969); *United States v. George C. Johnson, et al.*, A-30606 (October 25, 1966).

In the instant case the samples taken by the Government were as deep or deeper than those of the contestees (Tr. 221-223), and several

samples taken by the Government did in fact reach bedrock. See Contestant's Exhibits F, I, M, N, O, T, Q, R, and E-E. In any event, while a person might predict that greater values of gold would be found at bedrock, such a prediction does not establish a "discovery" in the absence of a showing of the physical existence of such mineralization. See *Henault Mining Company v. Tysk*, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); *United States v. Wayne Winters dba Piedras Del Sol Mining Co.*, supra.

VII.

Contestees next argue that certain gold assays of the Government's samples were not made in accordance with standard procedures and were, therefore, invalid. In support of this argument the contestees point out that several samples were panned and run through a rocker or sluice box by James Bassham, a man with no scientific background, rather than by the Government mining engineers.

Counsel for contestees had no objection to the admission of assay reports introduced by the Government (Exhibit G, Tr. 160). Government mining engineers in several instances personally performed the procedures in question (Tr. 250, 470). While Bassham may not have had formal scientific training, the record reflects that he was a professional panner (Tr. 251) and there is no evidence to indicate he lacked the requisite experience and knowledge necessary to perform the work

in question, or that he was incompetent in any respect.

Contestees also claim that the assaying methods used by the Government did not recover all of the gold from the sample. However, the record shows that the recovery of gold in the sampling methods used by the Government were at least as accurate as any possible placer mining method (Tr. 507, 515). We conclude, therefore, that the gold assays of the Government samples were valid.

VIII.

Contestees next claim that several of the Government samples on Tannery No. 2 were invalid. They assert that the evaluation of certain of these samples was erroneous because the samples did not reach bedrock.

Those samples which did not reach bedrock were valid for reasons previously stated.

Contestees also assert that the evaluation of the samples was erroneous because overburden was included in the material sampled. However, as noted in the Bureau decision:

It is standard procedure in the testing of a placer mining claim to take channel samples from top to bottom of a cut, trench or pit, and in taking samples by churn or auger drilling to include the overburden in arriving at the mineral values for the cost of removal including the removal of the overburden is a factor in determining whether a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *United States v.*

Robert W. Carnes, A-28178 (May 23, 1960).

IX.

Contestees next argue that it was error to judge a gold discovery by computing gold values averaged down by lithologic units.

The only evidence in the record which makes any reference to lithologic units appears in the testimony of Robert K. Evans, a geological engineer called by the Government. On direct examination he was asked whether he had reached any conclusions concerning the mineral valuation of the claims as a result of his examination. He stated (Tr. 177) :

A. Yes. Considering them either as a claim or as a separate lithologic unit, thinking in terms of mining Weaverville or mining Slate Creek, in none of those—it wouldn't warrant a man spending his time and money in the hope of developing a mine on any of them; and Tannery Gulch.

Q. Either as a claim?

A. Either as a claim or as a rock type unit.

The conclusion of the witness was the same whether mineral valuation was considered on the basis of lithologic units or on the basis of the mineral valuation of each separate claim. In light of this testimony we conclude that there is no merit to contestees' argument.

X.

Contestees next argue that the Judge erred in giving less evidentiary weight to the Yost report (Contestees' Exhibit 8) than he gave to the reports submitted by contestants.

AND DEL DE ROSIER

December 20, 1972

The Judge in his decision stated:

The evidence of high gold values shown in the Yost report has been refuted by the Contestants' evidence relating to the results of sampling conducted in the immediate vicinity of the excavations and drill holes put down by Yost. Since Yost was not called as a witness to support the findings related in his report, the report is accorded much less evidentiary weight than the reports and opinions of the Contestant's witnesses which were made subject to cross-examination.

The record shows that the Government made no objection to the admission of the Yost report into evidence (Tr. 240). Contestees maintain that the effect of the admission of the report into evidence without objection constituted a waiver of cross-examination by the Government, and that the Judge, therefore, erred in giving less weight to the Yost report on the basis that it was not subject to cross-examination.

We perceive no error on the part of the Judge with respect to the consideration he gave the Yost report. It is a proper function of the Judge to assess and weigh evidence in considering all of the evidence presented at a hearing. *United States v. Evelyn M. Kiggins, et al.*, A-30827 (July 12, 1968); *United States v. Taylor T. Hicks*, A-30780 (October 24, 1967). The fact that the report was not subject to cross-examination is certainly a legitimate factor for consideration. We disagree with contestees' reasoning that the Government waived cross-examination simply because it did not object to

the admission of the report into evidence without requiring contestees to lay a foundation. Nowhere in the record does it appear that the Government stipulated as to the truth of the contents of the Yost report, and the Judge did not err, under the circumstances in this case, in giving the Yost report less evidentiary weight than he did to similar reports submitted by the Government which were subject to cross-examination.

XI.

Contestees next argue that the Judge did not give sufficient weight to the reports of W. S. Lowden (Contestees' Exhibit 11), John D. Hubbard (Contestees' Exhibit 10), William D. Ball (Contestees' Exhibit 9), and R. G. Percy (Contestees' Exhibit 7). We disagree.

These reports contained some data favorable to contestees, but for the most part the reports failed to relate specific information to any of the claims in question. The examinations of the property which were reported in these documents were conducted intermittently from 1901 to 1942. None of the reports purported to discuss mineral values on specific claims as of the time contestees filed their application for patent, and no evidence was presented to show whether the conditions on the property had remained unchanged from the time that the reports were prepared. *See Adams v. United States*, 318 F. 2d 861 (9th

Cir. 1963); *United States v. Anton M. Ozanich*, 7 IBLA 144 (1972); *United States v. Calla Mortensen*, 7 IBLA 123 (1972).

XII.

Contestees next argue that the Judge erred in finding gold values reported by the contestee J. O. Archibald unworthy of belief. In the alternative, contestees assert that these gold values cannot be used to discredit Humboldt, which neither offered nor vouched for this evidence.

We are of the opinion that the Judge properly rejected these gold values. They were based on samples taken over a five-hour period, assayed by the "Douglas" process involving the use of two unidentified solutions, and averaged \$100 per cubic yard, and as high as \$200 gold per cubic yard in place. No evidence was submitted regarding the nature of the unidentified and "secret" solutions (Tr. 924-927, 945), or the process by which the reported gold could be recovered.

There is nothing in the record to compel the conclusion that the Archibald data in any way controlled the Judge's findings vis-a-vis Humboldt. The weight and credibility of evidence, in any event, are matters properly considered by the Judge in the first instance. *Of. State Director For Utah v. Edgar Dunham*, 3 IBLA 155, 78 I.D. 272 (1971). His findings, when in accord with the preponderance of the

substantial and probative evidence adduced, will not be disturbed. *Id.*

XIII⁴

XVII-XVIII

Contestees finally argue that the administrative action taken by the Department of the Interior in declaring the mining claims invalid amounts to an unlawful exercise of plenary power, and a taking of property without compensation, all in violation of the Constitution and laws of the United States.

This argument has no merit. The United States Supreme Court in *Best v. Humboldt Placer Mining Co.*, *supra*, had stated that "the Department has been granted plenary authority over the administration of public land, including mineral lands * * *." The Court also clearly recognized that the determination of the validity of the mining claims was an issue to be resolved in administrative proceedings before the Department. We are of the opinion that this issue has been decided in accordance with due process of law.

After due consideration we adopt as our own the Judge's rulings on each of the proposed findings of fact submitted by appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

⁴This relates to parts XVII and XVIII of appellants' brief. All other Roman numbers deal with identical designations in appellants' brief.

Paragraphs designated XIII, XIV, XV, and XVI of appellants' brief were considered under the heading of "Gold" and "Gravel."

December 27, 1972

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN, *Member*.

WE CONCUR:

DOUGLAS E. HENDERSON, *Member*.

JOSEPH W. GOSS, *Member*.

EASTERN ASSOCIATED COAL CORPORATION

1 IBMA 233

Decided December 27, 1972

Appeal by Eastern Associated Coal Corporation from a decision by Alfred P. Whittaker, Administrative Law Judge (formerly Departmental Hearing Examiner) in Docket No. MORG 72-15-P assessing civil penalties in the total amount of \$1,850 pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as Modified.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Elements of Proof—Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Elements of Proof

Notices of violation of section 304(d) of the Act based entirely on a visual observation by the inspector are unsupported by probative evidence and must be vacated.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Generally

An operator is entitled to adequate and timely notice of the section of the Act or

mandatory standard alleged to be violated in order to prepare a defense in a proceeding for assessment of civil penalty.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Generally

Section 304(a) and 304(d) of the Act were each designed for a distinct purpose and may be cited as independent violations.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger—Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

An order of withdrawal for imminent danger may be validly issued for conditions and practices not constituting violations, and it may also be true that violations specified in such an order may be valid and subject to penalty assessments but may not constitute imminent danger.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

The mere presence of an excessive accumulation of methane does not constitute a violation of section 303(h) (2) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Elements of Proof—Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Elements of Proof

Notices of violation of section 304(c) of the Act based entirely on the visual observation of the inspector are unsupported by probative evidence and must be vacated.

APPEARANCES: Thomas E. Boettger, Esquire, for appellant Eastern Asso-

ciated Coal Corporation; Robert W. Long, Associate Solicitor J. Philip Smith, Assistant Solicitor, and Madison McCulloch and Bernard M. Bordenick, Trial Attorneys, for appellee, U.S. Bureau of Mines.

OPINION BY THE BOARD
INTERIOR BOARD OF MINE
OPERATIONS APPEALS

Procedural and Factual
Background

On September 2, 1971, the Bureau of Mines (hereinafter "Bureau") filed a Petition for Assessment of Civil Penalties pursuant to section 100.4(i) of Title 30, Code of Federal Regulations,¹ for twenty alleged violations of the Federal Coal

Mine Health and Safety Act of 1969 (the Act).² Certain notices of violation involved herein were issued as a result of thirteen inspections which were conducted between August 4 and December 16, 1970. In addition, three violations arise from an order of withdrawal issued on September 24, 1970, and four others from an order of withdrawal issued on October 28, 1970. The orders of withdrawal were issued for imminent danger under section 104(a) of the Act. Upon the request of Eastern Associated Coal Corporation (Eastern) for formal adjudication a hearing was held and the Examiner issued a decision on June 2, 1972, assessing the following penalties.

<i>Violation No.</i>	<i>Date of Issuance</i>	<i>Sections Violated</i>	<i>Amount Assessed</i>
2 TBB.....	Aug. 4, 1970	304(d)	\$50
2 TEK.....	Aug. 10, 1970	304(d)	50
2 HCL.....	Aug. 18, 1970	304(d)	50
1 HCL.....	Sept. 2, 1970	303(y)(1)	0
3 HCL.....	Sept. 2, 1970	304(d)	50
3 HCL.....	Sept. 9, 1970	304(d)	50
2 HCL.....	Sept. 16, 1970	304(d)	50
2 HCL.....	Oct. 20, 1970	304(d)	50
1 HCL.....	Nov. 16, 1970	304(d)	50
2 HCL.....	Nov. 25, 1970	304(d)	50
3 HCL.....	Dec. 1, 1970	304(d)	50
3 HCL.....	Dec. 7, 1970	304(d)	50
2 HCL.....	Dec. 8, 1970	304(d)	50
2 HCL.....	Dec. 16, 1970	304(d)	50
1 HCL.....	Sept. 24, 1970	303(h)(2)	250
		304(a)	250
		304(c)	100
1 HCL.....	Oct. 28, 1970	304(a)	250
		304(c)	100
		302(a)	250
Total Amount.....			\$1, 850

¹ This regulation was in effect prior to June 15, 1972.

² 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

³ The record does not support this violation and the Judge correctly assessed no penalty but since he failed to formally vacate the notice the Board will do so herein.

December 27, 1972

Eastern owns 18 coal mines, operates its Federal No. 2 Mine in Monongalia County, West Virginia, in the vicinity of Grant Town, and generally delivers coal on a long-term contractual basis to its customers. Over 470 men are employed at the mine. The mine produces an average of 5,000 tons of bituminous coal a day from the Pittsburgh seam. Eastern asserts that it lost \$2,503,400 during the year of 1971.

Contentions on Appeal

Eastern contends that an inspector's visual observation alone is an inadequate basis for finding a violation of section 304(d). The two orders of withdrawal are contested on the ground that they fail to specify any violations of the Act, and that Eastern was not given effective notice of any of these purported violations prior to the assessment of Penalties. Eastern further contests being cited for violations of sections 304(a) and 304(b) for the same condition in the mine on the basis that this constitutes double assessment for the same violation. Finally, Eastern alleges that "imminent danger" did not exist; therefore, the two orders of withdrawal were improperly issued, and, if the orders of withdrawal fall, the alleged violations contained therein must fall with them.

The Bureau contends that the notices of violation of section 304(d) were proper and that a visual examination is sufficient to prove a violation of that section. In re-

sponse to Eastern's contention that the orders of withdrawal failed to allege specific violations of the Act, the Bureau argues that such orders are not required to do so, and that the existence of "imminent danger," questioned by Eastern, is not relevant in a penalty proceeding under section 109(a). Finally, the Bureau argues that the notices of violation of section 304(d) were validly issued and that such offenses are independent of violations of section 304(a).

DECISION BY THE BOARD

The record indicates that Federal mine inspectors issued thirteen notices of violation of section 304(d) during visits to the mine between August and December of 1970. Each of these notices (listed above) was based entirely on a visual observation by the inspector. Therefore, in accordance with our decision in *Hall Coal Company, Inc.*, 1 IBMA 175, 79 I.D. 668 (1972), we find that the violations in this matter are unsupported by probative evidence and must be vacated.

In general this Board finds no violation of due process where conditions or practices described in an order of withdrawal do not specify a particular section of the Act or mandatory standard violated. A notice or order is issued primarily for the purpose of advising the operator of an alleged violation so as to bring about timely abatement of the condition or practice constituting a safety hazard. We must look

first to this purpose to determine whether such notice is adequate. We believe as a general proposition that where an alleged violation is sufficiently described to permit abatement, adequate notice of the condition is established. We hold, however, that an operator is entitled to adequate and timely notice of the section of the Act or mandatory standard alleged to be violated in order to prepare a defense in a proceeding for assessment of penalty. In this proceeding, the notices and orders, except where specifically therein found to the contrary, did set out specific violations. Moreover, the Petition for Assessment of Penalties filed by the Bureau, following the request of the operator for formal adjudication, set forth specific sections of the Act and related each to a specific notice or order. Any reading of the petition together with the underlying notices and orders is in our opinion legally sufficient to put the operator on notice as to the substance of the alleged violations and to permit preparation of a timely and adequate defense. Therefore, we find no violation of administrative due process.

Eastern argues that issuance of a notice of violation of either section 304(a) or 304(d) precludes issuance of a notice of violation of the other. We cannot agree. Section 304 deals with coal dust conditions in general, but each of its four subsections deals with a certain specific violation. In this instance, subsection (a) prohibits any excessive accumulation of dust irrespective of the percentage

of incombustibles. Subsection (d) on the other hand requires specific percentages of incombustibles irrespective of accumulations. Furthermore, subsection (a) applies to *active workings* and *electric equipment*, while subsection (d) applies to the top, floor, and sides of *all underground areas*. While in some instances the physical areas of violation may be the same, the language of the subsections convinces us that each was designed for a distinct purpose and may be cited as an independent violation.

We also must reject Eastern's argument that where allegations in a section 104(a) order of withdrawal may not constitute imminent danger no penalty may be assessed for violations specified therein. Except insofar as an order of withdrawal may reflect upon the gravity of conditions and practices, the validity or invalidity of such order will not affect the subsequent assessment of penalties. An order of withdrawal for imminent danger may be validly issued for conditions and practices not constituting violations. It also may be true that violations specified in such an order may be valid but may not constitute imminent danger. The validity of an inspector's judgment in issuing an order may be challenged in a review proceeding brought under section 105 of the Act. However, where a section 104(a) order is vacated, the conditions or practices described in such order may, nevertheless, constitute violations of mandatory safety standards, subject

December 27, 1972

to penalty assessments. Considering all the circumstances of the two withdrawal orders in this proceeding, we do not find any error on the part of the inspector nor do we find that the Judge was improperly influenced by the orders of withdrawal in fixing the amounts assessed for violations specified in the orders.⁴

There remain for consideration the following three alleged violations contained in the two withdrawal orders:

*Order of Withdrawal No. 1 HCL,
September 24, 1970*

This order purports to set out three violations of the mandatory standards. The inspector found a violation of section 303(h)(2)⁵ of the Act in that methane was present in excess of six percent when measured six feet from the working face. We find that the Bureau failed to sustain its burden of proof, and the Judge erred in determining that excessive accumulation of methane alone constitutes a violation. This is a remedial section of the Act requiring immediate abatement of a dangerous condition upon its discovery. There is no evidence in the record that the operator failed to withdraw men from the affected

area of the mine or to cut off all electric power from the endangered area as the Act requires.⁶

The order of withdrawal did, however, allege, and the record supports the finding that there was an excessive accumulation of coal and coal dust on the floor of the No. 1 and No. 6 entries in violation of section 304(a) of the Act.

Additionally, on the basis of this order of withdrawal, Eastern was

twelve inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation of such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as to not endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane."

⁶ Congress constructed section 303(h)(2) stating first the condition that is a danger to the health and safety of miners: "(2) If at any time the air in any working place when tested at a point not less than twelve inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, * * *." Following this statement, the Congress placed a mandatory provision which if not carried out by an operator, would constitute a violation of the Act: "* * * changes or adjustments shall be made in ventilation of such mine * * *." The liberation of methane gas into a bituminous coal mine is not within the control of the operator. Methane can accumulate by a natural process as well as by the intrusion of mining operations, and the gas is not readily detectable by the human senses.

⁴ However, the Board does believe that in order to minimize argument on this point it may be better practice to limit specifications in a section 104(a) withdrawal order to conditions and practices actually constituting the imminent danger and to issue separate notices for all other violations.

⁵ "If at any time the air at any working place, when tested at a point not less than

assessed a penalty for a violation of section 304(c), which relates to the absence of rock dust. The Board finds that the inspector relied upon a visual examination. He admitted that there could have been some rock dust under the black coal dust. We hold that since no tests were taken of the dust to determine its content, the Bureau failed to sustain its burden of proof under section 304(c) of the Act.

Order of Withdrawal No. 1, October 28, 1970

On the above date, the inspector issued the section 104(a) order in a form similar to the first, citing the following conditions: (1) dangerous accumulations of loose coal and coal dust at specified locations (304(a)); (2) no rock dust on the floor

in specified locations (304(c)); and (3) dangerous unsupported roof for a distance of 30 feet in a specified area. The Board reverses the Judge's decision with respect to a violation of section 304(c). Here, again, as in the aforementioned 304(c) dispute, the inspector took no tests of the dust, and the record does not support the Judge's conclusion and assessment.

ORDER

WHEREFORE, in light of the foregoing, and pursuant to the authority delegated to the Board by the Secretary of the Interior, 43 CFR 4.1(4), IT IS HEREBY ORDERED:

1. That the Judge's decision as to the following violations IS AFFIRMED;

Order No.	Date of Issuance	Sections Violated	Amount Assessed
1 HCL-----	Sept. 24, 1970	304(a)	\$250
1 HCL-----	Oct. 28, 1970	304(a)	250
1 HCL-----	Oct. 28, 1970	302(a)	250
Total amount-----			\$750

2. That the following Notices of Violation ARE VACATED:

No.	Date of Issuance	Sections Cited
2 TBB-----	Aug. 4, 1970	304(d)
2 TEK-----	Aug. 10, 1970	304(d)
2 HCL-----	Aug. 19, 1970	304(d)
1 HCL-----	Sept. 2, 1970	303(y)(1)
3 HCL-----	Sept. 2, 1970	304(d)
3 HCL-----	Sept. 9, 1970	304(d)
2 HCL-----	Sept. 16, 1970	304(d)
2 HCL-----	Oct. 20, 1970	304(d)
1 HCL-----	Nov. 16, 1970	304(d)
2 HCL-----	Nov. 25, 1970	304(d)
3 HCL-----	Dec. 1, 1970	304(d)
3 HCL-----	Dec. 7, 1970	304(d)
2 HCL-----	Dec. 7, 1970	304(d)
2 HCL-----	Dec. 16, 1970	304(d)

3. That the following alleged violations ARE DISMISSED:

Order No.	Date of Issuance	Sections Cited
1 HCL-----	Sept. 24, 1970	303(h) (2)
1 HCL-----	Sept. 24, 1970	304(c)
1 HCL-----	Oct. 28, 1970	304(c)

4. That Eastern Associated Coal Corporation pay the total assessed penalties of seven hundred fifty dollars (\$750) on or before January 30, 1973.

C. E. Rogers, Jr., *Chairman.*

David Doane, *Member.*

Howard J. Schellenberg, Jr.,
Alternate Member.

**ESTATE OF STEPHEN BEAR a/k/a
STEVEN BEAR, VALJEAN BEAR,
STEVEN P. PETE
(DECEASED SAC AND FOX)**

1 IBIA 356

Decided *December 29, 1972*

Appeal from an order affirming order determining heirs after rehearing.

Appeal dismissed.

**130.7 Indian Probate: Appeals:
Timely Filing**

When a notice of appeal, postmarked a day after the expiration of the period, as extended, provided by regulation for filing an appeal, was not filed in the Judge's office until two days after the expiration of the period, as extended, the appeal is summarily dismissed as not timely filed.

APPEARANCES: Fairall and Fairall, appearing for Archie Bear, Jr.

OPINION BY McKEE

*INTERIOR BOARD OF
INDIAN APPEALS*

The decedent in this case died intestate and an order determining heirs was entered April 1, 1971, by Administrative Law Judge Vernon J. Rausch.

A petition for rehearing was filed by appellant on June 1, 1971, within the 60-day period provided for in 43 CFR § 4.241 of the regulations applicable to Indian Probate. A rehearing was held on September 29, 1971. Judge Rausch's order after rehearing affirming his initial order determining heirs was issued August 8, 1972. It is provided in 43 CFR 4.291(a), of the same regulations, that a Notice of Appeal may be filed within 60 days of such an order. Mr. Loyal S. Fairall, attorney for appellant, by letter/petition requested an extension of time of 30 days beyond the original 60 days. This was timely filed in the office of the Judge on September 20, 1972, and was duly forwarded to the Board. On September 26, 1972, the Board issued an order extending time for filing a notice of appeal to the close of business on November 6, 1972.

The appellant's notice of appeal was actually filed in the office of

Judge Rausch on November 8, 1972. It was enclosed in an envelope indicating that it was Certified Mail item No. 334593 and was postmarked "November 7, 1972, p.m." A copy of the same notice was received by the Board on November 10, 1972, enclosed in a plain envelope bearing a postmark "November 7, 1972, p.m." A finding is made that the letter/petition asking for an extension of time was timely filed within the original 60-day period following Judge Rausch's August 8, 1972 order. A finding is made that the notice of appeal was not filed within the time allowed by the order extending time, and the appeal is therefore subject to summary dismissal.

The Solicitor and this Board, acting for the Secretary under regulations approved by him, have continued the long-standing Departmental practice of rejecting appeals which were not timely filed under the regulations, *Estate of Ralyen or Rabyea Voorhees*, 1 IBIA 62 (February 12, 1971); *Estate of Jack Fighter*, 71 I.D. 203 (1964). The Board in *Voorhees* and the Solicitor in *Fighter* dismissed petitions not filed on or before the expiration of the 60-day period provided in the regulations, when they were not actually received by then. In *Estate of Jackson Searle*, IA-S-2(B) (September 11, 1969) the Solicitor, referring to the strict policy of refusing to entertain appeals not timely filed, dismissed an appeal not ac-

tually received before the expiration of the filing period.

It is necessary to require strict compliance with the time limitations provided in the regulations for filing a petition for rehearing or a notice of appeal because 43 CFR 4.274(a) provides that:

Unless the superintendent shall have received a petition for rehearing filed pursuant to the requirements of 4.241(a) or a copy of a notice of appeal filed pursuant to the requirements of 4.291(b), he shall pay allowed claims, *distribute the estate*, and take all other necessary action directed by the Examiner's (Judge's) final order. (Italics supplied.)

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the notice of appeal is DISMISSED, and the order of August 8, 1972, stands unchanged.

This decision is final for the Department.

DAVID J. MCKEE, *Chairman*.

I CONCUR:

DANIEL HARRIS, *Member*.

THE VALLEY CAMP COAL COMPANY

1 IBMA 243

Decided December 29, 1972

Appeal by The Valley Camp Coal Company from a decision of Alfred P. Whittaker, Administrative Law Judge (formerly Departmental Hearing Examiner), assessing civil penalties in

the total amount of eight thousand eight hundred seventy-five dollars (\$8,875) pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969. Hearing Docket No. MORG 72-16.

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Generally

An operator may be liable for a civil penalty for the violation of a mandatory safety standard even though there is no showing of negligence on his part. Negligence is a factor to be considered in determining the amount of the penalty.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Generally

Evidence of previous violations is admissible regardless of whether proposed assessments were paid because even though paid they are not offers of compromise. The Act requires that the operator's history of previous violations be considered in determining the amount of a penalty.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Generally—Federal Coal Mine Health and Safety Act of 1969: Burden of Proof—Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Elements of Proof

In proving a violation of section 304(c) (based on the absence of rock dust) the Bureau must first prove by a preponderance of the evidence that rock dust was required, i.e., that none of the exceptions in section 304(c) apply. When the exception involves specifically delineated percentages of incombustible dust content, proof that it does not apply should

be based upon samples and tests of the incombustible content of the dust.

Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

An order of withdrawal may be issued when no miners are in the mine in order to keep the miners out of the mine until the danger has been eliminated.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

In determining the amount of a penalty, the absence of miners in the mine can be considered in weighing the seriousness of the violation.

APPEARANCES: Arthur M. Recht, Esquire, for appellant, The Valley Camp Coal Company; Robert W. Long, Associate Solicitor, J. Philip Smith, Assistant Solicitor, Stanley M. Schwartz, Trial Attorney, for appellee, U.S. Bureau of Mines.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On September 2, 1971, the U.S. Bureau of Mines (Bureau) filed a petition for the assessment of civil penalties against The Valley Camp Coal Company (Valley Camp) in accordance with section 100.4, Title 30 Code of Federal Regulations¹ and section 109 of the Federal Coal Mine Health and Safety Act of

¹ The rules in force when the petition was filed have been revised since the Judge's decision. 37 F.R. 11861. The rules applicable to this case are those in effect prior to June 15, 1972, and all citations are to those rules.

1969 (hereinafter "the Act").² The Bureau sought assessment of penalties for violations of mandatory health and safety standards cited in six notices of violation and three orders of withdrawal.

A hearing was held, and on March 31, 1972, the Judge issued a decision finding Valley Camp liable for 29 violations. The penalties assessed and the sections of the Act which the Judge found violated are:

Notice of Violation	Date	Sections Violated	Amount of Assessment
1 JTC-----	June 18, 1970	305(c)	\$100
1 SRK-----	Sept. 2, 1970	304(a)	250
4 SRK-----	Sept. 2, 1970	304(c)	100
3 SRK-----	Sept. 17, 1970	304(a)	500
4 SRK-----	Sept. 17, 1970	304(c)	250
1 JTC-----	Oct. 20, 1970	306(f)	150
<i>Order of withdrawal³</i>			
1 SRK-----	Dec. 3, 1970	302(a)	250
		303(b)	250
		303(d)(1)	250
		303(d)	100
		304(a)	750
		304(a)	350
		305(c)	100
		305(c)	100
		306(d)	250
		306(f)	125
1 SRK-----	Dec. 30, 1970	304(a)	750
		304(a)	500
		304(c)	250
		305(c)	125
		306(f)	125
		306(d)	125
		306(f)	125
		305(c) ⁴	800
1 WS-----	Jan. 5, 1971	304(a)	1,000
		311(b) ⁵	250
		304(a)	250
		304(a)	500
		304(a)	100
Total-----			\$8,875

Valley Camp appealed the Judge's decision to this Board on

April 21, 1972, and timely briefs were thereafter filed by Valley

² P.L. 91-173, 88 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

³ All three orders of withdrawal were issued under section 104(a) of the Act for imminent danger.

⁴ Finding of fact number eight states that this is a violation of section 305(c). The Order, wherein the penalties were assessed, lists this as a violation of section 305(a).

This appears to be a typographical error, as the evidence indicates a violation of 305(c).

⁵ The same problem exists for this violation as the violation discussed in note 4. The findings of fact indicate a violation of section 311(f); the Order indicates a violation of section 311(b). A violation of 311(b) is supported by the record.

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Camp and the Bureau. The arguments of the parties are characterized below in "ISSUES PRESENTED."

Valley Camp's No. 1 Mine is a large, but unprofitable, mine employing approximately 350 workers underground. During 1970, the mine produced 1,478,303 tons, and had gross sales totaling \$8,907,334 and an operating loss of \$321,344. From January to September 1971, the mine produced 828,762 tons, had gross sales totaling \$5,717,527, and had an operating loss of \$1,175,410. In assessing the penalties, the Judge gave substantial consideration to this financial data, and Valley Camp does not appear to challenge this. In fact, Valley Camp apparently limits its arguments to the findings of violation and challenges none of the findings relating to the application of the six criteria set forth in section 109(a) of the Act.

ISSUES PRESENTED

- I. Whether, pursuant to section 109 of the Act, an operator is liable for a civil penalty if the underlying violation is not caused by the negligence of the operator.
- II. Whether evidence of previous violations is inadmissible in a penalty proceeding if proposed penalties have been paid for such violations.
- III. Whether a violation of section 304(c) of the Act may be found for a failure to rock dust if the violation is supported

solely by the visual observation of the mine inspector that rock dust was absent.

- IV. Whether, pursuant to section 109 of the Act, an operator is liable for a civil penalty if he voluntarily withdraws all underground production personnel from the mine before the Bureau of Mines issues an imminent danger order of withdrawal.

OPINION BY THE BOARD

I.

The issue of whether an operator is liable for a civil penalty for a violation not caused by his own negligence was resolved in *The Valley Camp Coal Co.*, 1 IBMA 196, 79 I.D. 625 (1972). In that case, we held that an operator can be liable for civil penalties even though there is no showing of negligence on his part. *Id.* 1 IBMA at 200-01. We reaffirm this holding.

II.

The second issue also was decided in the above-cited *Valley Camp* case. In that case, Valley Camp objected to the admission into evidence of previous notices of violation, because the proposed penalties for them had been paid, thereby converting them into inadmissible offers of compromise. In the present case, Valley Camp incorporates this argument by reference.

Evidence of previous violations is admissible, regardless of whether proposed assessments were paid, because, even though paid, they are

not offers of compromise. *Id.* at 203-04. Section 109(a) of the Act requires that the Secretary consider the operator's history of previous violations in determining the amount of a penalty.

III.

The third issue is whether a failure to rock dust in violation 304(c) can be proved solely by the visual observation of the Federal mine inspector that rock dust was absent. Two sections of the Act regulate the use of rock dust.

Section 304(c) states:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within forty feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than forty feet from a working face shall also be rock dusted.

Section 304(d) states:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each

0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

The above sections should be construed as a whole. Their purpose is to provide an incombustible atmosphere in most underground areas of the mine so that, if ignition occurs, the dust will not propagate an explosion. When read with this community of purpose and subject matter, sections 304(c) and 304(d) require operators to rock dust every crosscut as well as all other areas of the mine beyond 40 feet of working faces, unless such areas are naturally too high in incombustible dust content to propagate explosions, too wet to propagate an explosion, inaccessible, unsafe to enter, or have been excepted from the requirements by the Secretary or his authorized representative in accordance with section 304(c). Section 304(c) does not define the level of incombustibility that is "too high to propagate an explosion," but, when read as a whole, this level is defined by section 304(d).

In proving a violation of section 304(c) (based on an absence of rock dust), the Bureau must first prove by a preponderance of the evidence that rock dust was required, *i.e.*, that none of the exceptions in section 304(c) apply. When the exception is based on the specifically delineated percentages of incombustible dust content, proof that this does not apply should be based upon samples and tests of the incombustible con-

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tent of the mine's dust.⁶ See *Hall Coal Co., Inc.*, 1 IBMA 175, 177-78; 79 I.D. 668 (1972).

In the present case, the Bureau introduced no probative evidence on the incombustible dust content in Valley Camp No. 1 Mine. Therefore, we vacate Notice of Violation No. 4 SRK (9/2/70), Notice of Violation No. 4 SRK (9/17/70), and the alleged violation of section 304(c) described in Order of Withdrawal No. 1 SRK (12/30/70).

IV.

The fourth issue concerns Order of Withdrawal No. 1 WS, which was issued for imminent danger on January 5, 1972. Valley Camp contends that because all personnel had been voluntarily withdrawn from the mine prior to the inspection, imminent danger could not have been present when the order of withdrawal was issued, and therefore no penalty should be assessed.

Valley Camp bases its argument on an erroneous belief that an order of withdrawal cannot properly be issued if no miners are in the mine when the order is issued. We previously rejected this argument in *UMWA District #31 v. Clinchfield Coal Co.*, 1 IBMA 31, 41; 78 I.D. 153, 158 (1971), wherein it was held that because an order of withdrawal

not only takes the miners out of the mine, but also keeps them out until the danger has been eliminated, an order of withdrawal may be issued when no miners are in the mine.

Section 109 of the Act requires assessment of a penalty whenever a violation exists in a coal mine. A violation is any breach of a mandatory health or safety standard, and a miner does not have to be in danger of death or serious physical harm, see the Act § 3(j), for a violation to exist. In determining the amount of the penalty, however, the absence of miners can be considered in weighing the seriousness of the violation. See *Robert G. Lawson Coal Co.*, 1 IBMA 115, 120; 79 I.D. 657 (1972).

V.

Finally, Valley Camp objects to any finding of violation contending that there was insufficient facts to sustain the violations. We do not believe that this argument deserves consideration by the Board. Valley Camp's argument lacks specificity in its objection, its reasoning, and the evidence relied upon. Therefore, the Board considers Valley Camp to have waived objection to any error other than the four discussed above. 43 CFR 4.601(a).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)) IT IS HEREBY ORDERED that:

⁶ In the present case, the operator challenges only the Bureau's lack of proof on the mine's incombustible dust content. Nevertheless, it is the Bureau's burden of proof to establish the inapplicability of all the exceptions in section 304(d). Some of the exceptions, however, can be excluded by the inspector's visual observation.

(1) The decision of the Judge IS REVERSED as to the following: Notice of Violation No. 4 SRK (9/2/70), Notice of Violation No. 4 SRK (9/17/70), and the alleged violation of section 304(a) described in Order of Withdrawal No. 1 SRK (12/30/70);

(2) Notice of Violation 4 SRK (9/2/70), Notice of Violation 4 SRK (9/17/70), the alleged violation of section 304(c) described in Order of Withdrawal 1 SRK (12/30/70), and the penalties assessed in connection with each of these ARE VACATED;

(3) As to all other violations, the decision and order of the Examiner IS AFFIRMED; and

(4) The Valley Camp Coal Company pay \$8,275 on or before February 1, 1973.

C. E. ROGERS, Jr., *Chairman.*

DAVID DOANE, *Member.*

MID-CONTINENT COAL AND COKE COMPANY

1 IBMA 250

Decided *December 29, 1972*

Appeal by the Bureau of Mines from a decision by Dent D. Dalby, Administrative Law Judge (formerly Departmental Hearing Examiner), vacating eight notices of violation of the Federal Coal Mine Health and Safety Act of 1969 charged to Mid-Continent Coal and Coke Company (Docket Nos. DENV 72-10-P; 72-12-P; 72-31-P).

Affirmed as modified.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation

Failure by an operator upon becoming aware of the presence of 1.0 volume per centum or more of methane at a working place to do any of the following would violate section 303(h) (2): *first*, to make immediate changes or adjustments in the ventilation of the mine; *second*, to cut off power to electric face equipment located in the affected area while adjustments are being made in the ventilation; *third*, to stop all work immediately in the affected area; *fourth*, to take precautions so as to prevent other areas of the mine from becoming endangered; *fifth*, to withdraw all persons except those referred to in section 104(d) of the Act at any time that a working place contains 1.5 volume per centum or more of methane.

Federal Coal Mine Health and Safety Act of 1969: Generally

The definition of "working place" in section 318(g) (2) of the Act means inby the interior-most rib or wall of the last open crosscut.

Federal Coal Mine Health and Safety Act of 1969: Injunctions—Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where 30 CFR 75.1403-7(d) was subject to the injunction in *Ratliff v. Hickel*, Civil Action No. 70-C-50-A (W.D., Va.,

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April 23, 1970), the inspector should have notified the operator to properly connect chains between mantrip cars, but he should not have issued a notice of violation of section 314(b) to circumvent the injunction.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where an operator is charged with a duty of inspection of a high-voltage cable in an entry, the entry constitutes an active working, and it is subject to the requirements of 30 CFR 75.400.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Generally

Where an operator failed to reinsulate wires, which were originally encased by individual insulation and by an outer cable jacket, with two layers of friction tape, a violation of 30 CFR 75.514 occurred.

APPEARANCES: Robert W. Long, Associate Solicitor, J. Philip Smith, Acting Assistant Solicitor, Albert Witham, Office of the Regional Solicitor, Denver, Colorado, Bernard M. Bordenick, John O'Donnell, Trial Attorneys in behalf of the Bureau of Mines; Robert Delaney, Esquire, Delaney and Balcomb, Glenwood Springs, Colorado, in behalf of Mid-Continent Coal and Coke Company.

OPINION BY THE BOARD INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On October 28, November 9, and December 9, 1971, the Bureau of

Mines (Bureau) petitioned for assessment of civil penalties under the Federal Coal Mine Health and Safety Act of 1969 (the Act)¹ against Mid-Continent Coal and Coke Company (Mid-Continent). The petitions incorporated by reference the notices of violation and withdrawal orders which had been issued previously to Mid-Continent by Bureau coal mine inspectors. The three petitions were consolidated for hearing which was held in Grand Junction, Colorado, on March 21, 22, and 23, 1972. Mid-Continent was charged with numerous violations, some of which were dismissed at the hearing on the motion of the Bureau. Nine violations of the Act or Regulations² at the L. S. Wood Mine and 16 violations at the Dutch Creek No. 1 Mine (a total of 25) were the subject of the hearing. The Judge's decision, dated July 21, 1972, vacated 13 of the 25 notices. The Bureau timely filed its Notice of Appeal and its brief which challenges the Judge's decision to vacate eight of the 13 notices. A reply brief was filed by Mid-Continent,³ which was assessed a total amount of \$3.925 in civil penalties for the 12 violations not vacated by the Judge. The Bureau appeals the vacation by the Judge of the following eight violations:

¹ P.L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

² Title 30, Code of Federal Regulations.

³ Although untimely filed, the Mid-Continent brief has been fully considered by the Board.

L. S. WOOD MINE

<i>Date of Notice</i>	<i>Number</i>	<i>Section of Act allegedly Violated</i>
(1) September 17, 1970.....	2-JLB	303(h) (2)
(2) December 29, 1970.....	1-JLB	303(h) (2)
(3) January 26, 1971.....	1-RLM	303(h) (2)

DUTCH CREEK NO. 1 MINE

(4) October 6, 1970.....	1-JLB	314(b)
(5) November 10, 1970.....	2-JLB	303(h) (1)
(6) January 7, 1971.....	2-JLB	30 CFR 75.514
(7) January 7, 1971.....	1-JLB	30 CFR 75.400
(8) January 27, 1971.....	2-JLB	30 CFR 75.400

Contentions of the Parties

The Bureau argues with respect to the eight vacated Notices of Violation that the Judge erred in his interpretation of the respective sections of the Act or Regulations; whereas Mid-Continent contends that the Judge made the correct findings and conclusions, based upon substantial evidence in the record, and that his decision should be affirmed by the Board.

L. S. Wood Mine: Notices of Violation, September 17, 1970, December 29, 1970, and January 26, 1971, Involving Section 330(h) (2) of the Act

The Inspector's Notices with respect to the three alleged violations of section 303(h) (2) in the L. S. Wood Mine indicated the presence of methane in excess of 1.0 volume per centum in the ventilating current at three different locations ⁴ on

three different dates. The Inspector testified that he made the tests at a point not less than 12 inches ⁵ from the roof, face, or ribs, with an electric methane detector and permissible flame lamp. The Notices of September 17 and December 29 were terminated within a short time on the same dates they were issued due to the immediate efforts of the operator to improve the ventilation. The Notice of January 26 was not terminated for six days because of the unusual difficulty encountered in dissipating a "bleeding" pocket of gas. The record shows and the Judge found that the operator took

ber and December Notices, it is clear from the record that the Inspector made methane tests IN the last open crosscut. Whether INBY means IN satisfying the definition of "working place" is dealt with *infra* at 255; however, the Board need not rely on this definitional matter in order to decide the instant issue.

⁵ The Notice, dated January 26, indicates that the Inspector made methane tests in a faulted area 75 feet from the face. The record shows that prior to a working shift, the Inspector climbed into a cavity about 12 feet high (the average roof is seven feet high) and discovered methane in excess of 1.3 percent at least 12 inches from the roof, whereupon he issued the Notice of Violation of section 303(h) (2). A subsequent 104(b) Order was issued when abatement procedures proved unsuccessful.

⁴ Regarding the *specific* locations, the three Notices of Violation of section 303(h) (2) failed to clearly allege that the Inspector's methane tests were made at a "working place," defined as, "inby the last open crosscut" in section 318(g) (2). As to the Septem-

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immediate steps as to all three Notices to abate the methane conditions pointed out by the Inspector and shut down all electric face equipment. Section 303(h) (2) reads as follows:

If at any time the air at any working place, when tested at a point not less than twelve inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of this Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

The Bureau argues that section 303(h) (2) of the Act establishes a mandatory standard which is violated "if at any time" 1.0 volume per centum or more of methane is discovered by an inspector. The Board believes that the Congress so constructed section 303(h) (2) to state first, the condition that is a danger to the health and safety of miners: "*If at any time the air in any working place * * * contains 1.0 volume * * * of methane * * **" and second, following this supposi-

tional "if" clause, the mandatory standard (comparatively a "then" clause), which if not observed and implemented by an operator would constitute a violation of the Act for which a civil penalty should be assessed. (*Italics added.*)

Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation. As Mid-Continent aptly points out in its brief at page five, "To so hold, would simply shut down and make impossible the mining of coal from seams in which methane is present." The Board well recognizes that the *liberation* of methane gas into a bituminous coal mine is not within the control of an operator. Methane can be liberated by natural processes as well as by the intrusion of mining operations, and the gas is not readily detectable by the human senses. As the Bureau Inspector in this case, J. L. Bishop, testified with respect to the presence of methane gas, " * * * [C]onditions in a coal mine are subject to changes from one minute to the next or even one second to the next * * * ." (Transcript at 87, hereinafter Tr. —.)

Failure by an operator upon becoming aware of the presence of 1.0 volume per centum or more of methane at a working place to do any of the following would violate section 303(h) (2): *first*, to make immediate changes or adjustments in the ventilation of the mine; *second*, to cut off power to electric face equipment located in the affected area while adjustments are being made in the

ventilation; *third*, to stop all work immediately in the affected area; *fourth*, to take precautions so as to prevent other areas of the mine from becoming endangered; *fifth*, to withdraw all persons except those referred to in section 104(d) of the Act at any time that a working place contains 1.5 volume per centum or more of methane.

It is clear from the record and the Judge's decision that the Bureau did not sustain its burden of proving a violation of section 303(h)(2). The Board accordingly will affirm the Judge's decision, vacating these three Notices of Violation. The Judge erred, however, by not vacating the 104(b) Withdrawal Order of January 26, 1971. It, too, should have been vacated because it was based upon a violation which the Judge had vacated.

Dutch Creek No. 1 Mine: November 10, 1970, 2-JLB, Involving Section 303(h)(1)

On the above date Inspector Bishop observed a continuous miner "brushing bottom"⁶ for a period in excess of twenty minutes without testing for methane. Bishop issued a Notice of Violation of section 303(h)(1) of the Act which requires such tests to be made at intervals of not more than twenty minutes dur-

ing each shift "at each working place." As the Judge noted in his decision, the Act defines "working place" as "The area of a coal mine *inby* the last open crosscut." (Italics added.) "Inby" is defined as follows:

a. Toward the working face, or interior, of the mine; away from the shaft or entrance: * * * b. In a direction toward the face of the entry *from the point indicated as the base or starting point*. c. The direction from a haulage way to a working face * * * d. Opposite of outby. (Italics added.)⁷

The Bureau contends that a mining machine would be no less inby the last open crosscut if it is "brushing bottom" in the crosscut, removing coal from the ceiling of the crosscut, or performing any other mining activity inby the exterior rib line of the last open crosscut (exterior rib line means the line of the wall closest to the portal of the mine). The Bureau further contends that the Congress intended such a definition of "inby the last open crosscut" because to hold otherwise would exempt any type of mining operation in the last open crosscut from methane monitoring.

The Judge relied upon Inspector Bishop's unrefuted testimony that "this machine was operating in the last open crosscut, grading bottom, approaching a pillar that they were to retrieve." (Tr. 467.) He concluded that a machine operating in the last open crosscut is not operating at a "working place."

⁶ "Brushing bottom," as described by the Inspector means:

"* * * They have a heaving condition on the floor [of the mine] and periodically they have to come back and remove some of the material on the floor to increase the height of the opening so they can mine the coal." (Tr. 463.)

⁷ *A Dictionary of Mining, Mineral and Related Terms*, at 572 (P. Thrush, ed., 1968) (U.S. Bureau of Mines).

The Board affirms the Judge's findings and conclusion with regard to this Notice. Logic dictates that "inby the last open crosscut" means inby the interior-most rib or wall. Otherwise, the definition of "working place" would give rise to the untenable situation in which the last open crosscut is inby itself. The Board understands the Bureau's argument that the Judge's decision exempts a critical working area of the mine from methane monitoring, but we can find no support for the Bureau's position in the language of the Act or the legislative history. The Act *does* provide safeguards other than monitoring in the last open crosscut. The primary safeguard against methane in the last open crosscut is proper ventilation. We believe that the Congress carefully developed the definition of "working place" on the assumption that sudden liberations of methane are more dangerous to the health and safety of the miners in the *cul de sac* extensions (inby the interior-most rib) where the full force of ventilating currents (in the crosscut) cannot immediately carry the gas away.⁵

*Dutch Creek No. 1: October 6, 1970,
1-JLB, Involving Section 314(b)*

On October 6, 1970, Inspector Bishop cited an alleged violation of the Act in the Dutch Creek No. 1

Mine which is immediately adjacent to the L. S. Wood Mine. The Notice was issued under section 314(b), which states:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Bishop found that mantrip cars, which were connected by links and pins and pulled up slopes by rope, did not have safety chains. Safety chains in Bishop's opinion added a second line of safety similar to their use on trailers pulled behind trucks and cars. The Regulations under section 314(b) provide in pertinent part:

* * * Where ropes are used on slopes for mantrip haulage, such conveyances should be connected by chains, steel ropes, or other effective devices between mantrip cars and the rope. [30 CFR 75.1403-7 (d)]

As the Inspector noted (Tr. 441), on the date of the Notice the Regulations under section 314(b) were subject to a restraining order imposed by *Ratliff v. Hickel*, Civil Action No. 70-C-50-A (W.D., Va., April 23, 1970), which was not dissolved until November 10, 1970. The Board finds from his own testimony (Tr. 438) that Bishop nevertheless tried to enforce section 75.1403-7(d) while such enforcement was restrained by the *Ratliff* decision.

We agree in principle with the Inspector that safety chains should have been used between the mantrip cars, and we note that a chain was attached on one of the cars but not connected to the next. This suggests

⁵ Whereas the minimum volume of air per minute required in the last open crosscut is 9,000 cubic feet (30 CFR 75.301), "A minimum quantity of 3,000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined or loaded * * *." (30 CFR 75.301-1).

to the Board that it was sometimes the practice at the mine to use safety chains. Under these circumstances, however, it is our view that the Inspector should have notified the operator to properly connect chains between mantrip cars, but he should not have issued the Notice of Violation of section 314(b) in an attempt to enforce the Regulations subject to the injunction in *Ratliff*. The Notice of Violation was correctly vacated by the Judge.

Dutch Creek No. 1 Mine: January 7, 1971, 1-JLB, and January 27, 1971, 2-JLB, Involving 30 CFR 75.400 [Section 304(a) of the Act]

Inspector Bishop issued a Notice of violation of section 75.400 of the Regulations after finding "dangerous accumulations" of float coal

* With respect to the "accumulation" of float-coal dust observed by the Inspector on January 7, the record reveals the following: the Inspector observed a generally black condition with occasional gray or white spots in the Six North Slope Entry for a distance of about 300 feet and also in the four or five intersecting crosscuts. He stirred the dust occasionally in the crosscuts where the deposits of coal dust were slightly greater than in the entry and estimated that the depth of the combined rock and coal dust throughout the area averaged four to six inches. The mine foreman did not hesitate to inert the coal dust with rock dust. The immediate hazard presented was combustion and explosion; and the high-voltage cable carried in the entry was the only apparent source of ignition in the event of a roof fall. In general, The Inspector was satisfied with the rock dusting program in the mine. He admitted that this infraction occurred in an isolated location, that there were no miners in the area, and that the coal dust did not extend to any working area of the mine. (Tr. 484-494.) This does not conflict with our finding that the entry constituted an "active working."

dust * * * along the parallel slope entry [to the Dutch Creek No. 1 Mine] and [in] connecting crosscuts for approximately 300 feet in by Six North Conveyor Belt." (Exhibit 72-10-P-27.) The Judge vacated the Notice on the grounds that the area inspected did not constitute "active workings" of the mine. Section 318(g) (4) of the Act defines "active workings" as " * * * any place in a coal mine where miners are normally required to work or travel."

Bishop testified that a high-voltage cable is carried along the entry where the accumulation of dust was discovered (Tr. 489). Section 308 (h) of the Act requires "All underground high-voltage transmission cables shall be installed only in *regularly inspected aircourses and haulageways* * * *" (Italics added).

Since the operator is charged with the duty of regular inspection of the high-voltage cable, it can be inferred that a miner or miners normally work and travel in this entry. The Board concludes that the entry is subject to the requirements of section 75.400 of the Regulations [section 304(a) of the Act] because it *does* constitute an "active working." Even though it may be that only one miner is required to regularly inspect the entry, an accumulation of coal dust is a potential hazard to him, and clean-up procedures are therefore warranted.¹⁰

¹⁰ We believe the appropriate action to be taken pursuant to section 75.400 would be to clean up rather than to rock dust an accumulation.

December 29, 1972

Another accumulation¹¹ of coal dust was observed by Inspector Bishop in the Dutch Creek Mine on January 27 from the Three South Belt to the Five South Belt, a distance of approximately 1,500 feet. A high-voltage cable was carried along the left rib in the No. 3 slope entry where the accumulation was discovered. The Board reaches the same conclusion as above with respect to this Notice of Violation, and will reverse the Judge's decision as to both violations.

Dutch Creek No. 1 Mine: January 7, 1971, 2-JLB, Involving 30 CFR 75.514

Inspector Bishop issued a Notice of Violation of 30 CFR 75.514 for an allegedly improper splice in the power cable for the sequence switch on the Five South Conveyor Belt. Section 75.514 states in pertinent part: "All electrical connections or splices in insulated wire shall be re-insulated at least to the same degree of protection as the remainder of the wire."

The Inspector found that about six inches of the power cable was not protected by an outer jacket, whereas the remainder of the cable was so protected. The cable, containing three individually insulated wires, was mounted on insulated "J"

hooks. The Judge vacated the Notice of Violation because in his view the Regulations did not require a cable jacket to protect insulated wires suspended on insulated "J" hooks. Mid-Continent contends that since it could have stripped away the entire jacket and still have been in compliance with the Regulations, the six inches of missing cable jacket could not constitute a violation.

The Bureau argues that the wires were originally encased by individual insulation and, in addition, by a cable jacket and that each layer of insulation related to each wire. Thus, by failing to repair the six-inch length of cable jacket with friction tape, the operator failed to reinsulate each wire to the same degree of protection as the remainder of the wire.

The Board recognizes that this is a close question, but it believes that the Bureau has sustained its burden of proving, at most, a technical violation.

Assessment of Civil Penalties

Pursuant to section 109(a) (1) of the Act, the Board assesses a civil penalty of \$25 for each of the two violations of section 75.400 of the Regulations discussed above and an additional penalty of \$1 for violation of section 75.514. Such penalties are based upon consideration of the statutory criteria as follows: (1) The earliest violation found by the Judge dated back to June 23, 1970, shortly after the Act became effective. We conclude that a substantial portion of Mid-Continent's history

¹¹ Bishop observed general accumulations of coal dust deposited for a distance of 1,500 feet which covered the width of the entry and the ribs. By mixing the dust with a testing rod, Bishop estimated that the mixture of coal and rock dust was deeper than ten inches in some places to a minimum depth of four inches in others. The Inspector testified that he thought the actual hazard involved was small.

of previous violations is present in this record, and we find that it is only of moderate significance. (2) We find that Mid-Continent's L. S. Wood Mine employed approximately 56 men, 25 of them underground on two working shifts and a maintenance shift, five or six days a week (Tr. 39). We find that this is not a small mine, and it is only part of Mid-Continent's coal mining interests; therefore, the amount of \$51 in penalties is not inappropriate. (3) Since the Board is interpreting for the first time a new and unusual set of circumstances, and since we find that one of the violations is only technical, we conclude that the operator was not negligent. (4) Considering the approximate number of men on the payroll in one of Mid-Continent's mines (above) and the company's failure to appeal nearly \$4,000 in penalties assessed by the Judge, we find that the additional penalties will not affect the

operator's ability to stay in business. (5) As to the violations of section 75.400 of the Regulations we find that neither of the mine entries involved was heavily traveled and that a ready source of ignition was not present in either of them. We find also that the violation of section 75.514 of the Regulations was of a technical nature and therefore conclude that none of the three violations was grave. (6) The operator demonstrated his good faith by complying rapidly with the Inspector's instructions.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. The Judge's decision IS REVERSED as to three Notices of Violation and penalties are assessed as set out below:

<i>Date</i>	<i>Number</i>	<i>Amount Assessed</i>
January 7, 1971-----	1-JLB-----	\$25
January 27, 1971-----	2-JLB-----	25
January 7, 1971-----	2-JLB-----	1
Total-----		<u>\$51</u>

2. The Order of Withdrawal of January 26, 1971, IS VACATED;

3. The Judge's decision IS AFFIRMED in all other respects; and

4. Mid-Continent pay the Administrative Law Judge's assessment

of \$3,925 plus the above assessment of \$51, or a total of \$3,976, on or before January 31, 1973.

C. E. ROGERS, Jr., *Chairman.*

DAVID DOANE. *Member.*

INDEX-DIGEST

(Note—See front of this volume for tables)

ADMINISTRATIVE PRACTICE

1. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit, the leased lands are situated in whole or in part on the known geologic structure of a producing oil or gas field, and the lease terms and factual circumstances are identical to those in the decision, *Standard Oil Company of California, et al.*, 76 I.D. 271 (1969), this Department will follow the ruling by the United States Court of Appeals for the Ninth Circuit in *Standard Oil Company of California v. Morton*, 450 F. 2d 493 (1971), which overturned that decision solely upon principles of contract construction; therefore, the eliminated lands will retain the rental rate applicable to nonparticipating acreage within the unit rather than the higher rate applicable to non-unitized lands within a known geologic structure.
2. "Competitive Bidding." Competitive bidding does not require that more than one bid be submitted before the authorized of-

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- ficer, but only that the officer, by due advertisement, give opportunity for everyone to bid----- 596
3. Administrative agencies have the power to make their own findings regardless of the findings of an Examiner so long as their findings are based on substantial supporting evidence in the record----- 677

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1. A decision of a district manager which is arbitrary or capricious will not be sustained, when challenged by one who has standing, even in the absence of any evidence of serious economic impact. To that extent, *National Livestock Company and Zack Cox, I.G.D.* 55 (1938), is overruled-----
2. A decision involving the exercise of administrative discretion, which is supportable on any rational basis, is not arbitrary or capricious. An apportionment of the federal range, involving some abolition of "split-use" between states and based upon the effectuation of a management

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plan reasonably related to the protection of forage and other values, has, therefore, a rational basis and is not arbitrary or capricious.....

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3. The marketability test, as developed by this Department and approved by the courts, is a complement to the prudent man test of discovery of a valuable mineral deposit under the mining laws, and publication of the test in the *Federal Register* is not a prerequisite to its validity.....

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4. The marketability test of discovery of a valuable mineral deposit under the mining laws does not violate due process of law as being unconstitutionally vague, or as being unlawful administrative legislation.....

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5. A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some prehearing newspaper publicity that the contest was being instituted but the claimant does not show that there was any unfairness in the contest proceeding itself.....

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1. A decision of a district manager which is arbitrary or capricious will not be sustained, when challenged by one who has standing, even in the absence of any evidence

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1. In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is being met by more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes..

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2. A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's *prima facie* case of no discovery with a preponderance of the evidence.....

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2. Section 8(b) of the Administrative Procedure Act requires findings of fact. In the absence of findings it may be impossible for the Board of Mine Operations Appeals to review a decision of an Examiner, and the case should be remanded to the Examiner-----

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3. A statement made in a Bureau appeal decision which does not accurately reflect one evidentiary fact does not establish that the decision's other findings were erroneous, and this Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that conclusion-----

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4. Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after an initial decision in a

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mining contest may not be considered or relied upon in making a final decision, but may only be considered to determine if there should be a further hearing-----

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1. Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision, but may only be considered to determine if there should be a further hearing-----

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| 1. A claim asserted under the Suspension of Work clause for costs arising out of a delay in performance of a construction contract caused by the exhaustion of available funds following the Government's failure to appropriate additional moneys necessary to enable a contractor to complete the work prior to the time established by the contract and the President's subsequent impounding of such funds, which resulted in the contractor's election to stop work, was dismissed as being outside the Board's jurisdiction since the contract provided that the Government's liability for work costing in excess of a specified amount reserved and available for payment was contingent upon further appropriations and reservation, and the President's action was a sovereign act taken to halt inflation, neither of which is considered to be a stoppage by actual or constructive direction of the contracting officer in the administration of the contract within the meaning of the Suspension of Work clause..... | 644 |
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BOUNDARIES

(See also Surveys of Public Lands.)

1. In determining what land is conveyed under patents or grants of public land bordering on a meandered body of water, the general rule is that the waterline itself, not the meander line, constitutes the boundary except where there is fraud or gross error shown in the survey of the lines or where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines.....

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COAL LEASES AND PERMITS**GENERALLY**

1. Neither statute nor regulation prohibits the granting of coal prospecting permits or leases which are limited to a specific depth, stratum, contour or horizon, and therefore, in view of the broad discretionary nature of the authority vested in the Secretary by the Mineral Leasing Act, the question of allowing such horizontally limited permits or leases is exclusively a policy determination.....

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PERMITS

1. A coal prospecting permit may be allowed where the Geological Survey reports that the lands are underlain by beds of coal which are too deep for economical mining in light of tremendous reserves of coal of comparable quality which are recoverable by less costly surface mining methods in the same vicinity.....

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COAL LEASES AND PERMITS—Continued

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2. Rejection of applications for coal prospecting permits is properly reversed when the applicant presents persuasive and convincing evidence which clearly shows to be erroneous a determination of the Geological Survey that the lands sought are underlain by several thick beds of economically workable coal deposits and are therefore subject to leasing only.....
3. In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, the Secretary of the Interior is entitled to rely upon the reasoned opinion of his technical expert, the Geological Survey. Absent a clear showing that the Survey's determination was improperly made, the Secretary will not act to disturb the determination. However, a prospecting permit may be granted where there is no substantial evidence to support Geological Survey's opinion that the workability of coal underlying the land applied for is known. The "workability" of the coal is an economic concept.....

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Workability

1. In determining "workability" in a coal prospecting situation the standard to be applied is set forth in the U.S. Geological Survey Manual, section 671.5.2(b), which points to earlier decisions of the Department stating that

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the workability of any coal will ultimately be determined by two offsetting factors: (a) its character and heat-giving quality, whence comes its value, and (b) its accessibility, quantity, thickness, depth and other conditions that affect the cost of this extraction-----

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COLOR OR CLAIM OF TITLE

GENERALLY

1. The purpose and intent of the Color of Title Act, 43 U.S.C. §§ 1068, 1068a, 1068b (1970) is to provide a legal method whereby citizens, relying in good faith upon title or claim derived from some source other than the government, and who have continued in peaceful, adverse possession of public land for the prescribed period of 20 years and had made valuable improvements, or have reduced some part of the land to cultivation, might acquire title thereto. However, the statute was not intended to provide a means for obtaining a patent by the mere occupation of public land under a mere pretense of title or claim, or a title or claim which the claimant had knowledge or good reason to believe was not in good title-----
2. One who has not reached his majority (*i.e.* is a minor) may acquire title by adverse possession. However, he must show that he claims the land as

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against everyone. If he resides on the land with his mother, who has knowledge of the defective title, he is chargeable with that knowledge-----

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3. A quiet title decree by a state court may not be relied upon by an applicant under the Color of Title Act as giving color of title to support a class 1 claim where the holding of the land under the decree falls short of the 20-year statutory period required-----

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4. The mere payment of property taxes assessed by a county is not sufficient, alone, to constitute a holding of land by the taxpayer under a claim or color of title as required by the Color of Title Act-----

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5. Under the Color of Title Act the requisite holding of land under some claim or color of title is not satisfied because of changes in the movement of a river affecting the riparian land, where the applicant has no basis for believing he had title to the land derived from some source other than the United States-----

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APPLICATIONS

1. A quiet title decree by a state court may not be relied upon by an applicant under the Color of Title Act as giving color of title to support a class 1 claim where the holding of the land under the decree falls short of the 20-year statutory period required-----

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COLOR OR CLAIM OF TITLE—Con.

GOOD FAITH

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1. Good faith in adverse possession requires that a claimant honestly believed there was no defect in his title and the Department may consider whether such belief was unreasonable in the light of the facts then actually known or available to him. Once it is established that the claimant knew that the land was owned by the government and that he did not have a valid title, he is presumed to know that under the law he cannot acquire title or any right to the land merely by continuing to occupy it. There can be no such thing as good faith in an adverse holding where the party knows he has no title or fails to demonstrate a rationally justifiable reason for believing that he had title. 588

CONSTITUTIONAL LAW

1. The marketability test of discovery of a valuable mineral deposit under the mining laws does not violate due process of law as being unconstitutionally vague, or as being unlawful administrative legislation. 588
2. A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some prehearing newspaper publicity that the contest was being insti-

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tuted but the claimant does not show that there was any unfairness in the contest proceeding itself. 588

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(See also Rules of Practice.)

GENERALLY

1. Where the Government has made a *prima facie* showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimant. 709

CONTRACTS

(See also Rules of Practice.)

CONSTRUCTION AND OPERATION

Actions of Parties

1. Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government first erroneously staked the depth of the trench to 28 feet and thereafter to 42 feet before rock was ultimately reached at 60 feet, and the contracting officer issued a change order to compensate the contractor for certain additional expenses caused thereby, including the increased cost of dewatering the trench at the specified depth, but refused to provide for the increased cost of backfilling on the ground that the contractor was charged at the prebidding stage with the knowledge that backfilling would be required at the 60-foot depth, the contractor was

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also entitled to an equitable adjustment for its additional cost of backfilling resulting therefrom. The issuance of the change order constituted an acknowledgment of Government responsibility for the direct consequences of the erroneous staking and it was therefore inconsistent to include the dewatering costs but not to compensate for the backfilling as well.-----

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2. Where a contract bid invitation provided for alternative methods for the construction of a road, and the specifications required the placement of 4 inches of surfacing material instead of the 6 inches shown in the plans without indicating any change in elevation or in the specified cross-section profiles, the contractor's action to substantially complete the subgrade elevation 2 inches higher in order to achieve the same finished surface elevation and the acquiescence of the Government supervisor constituted a contemporaneous interpretation of ambiguous specifications. The ambiguity having been resolved by conduct of the parties amounting to an agreed upon, reasonable interpretation of the specifications, subsequent directions by the Government to change the subgrade elevation were compensable contract changes.-----

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1. Where a contract for the construction of a road indicated that the material to be excavated in roadway excavation was unclassified and the specifications and logs of exploration of test pits referred to the existence of rock at the site, a contractor was unwarranted in assuming that roadway excavation came within the definition of common excavation, which excluded rock, and that rock would not be encountered in such excavation.-----

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2. A contractor under a contract for the construction of a road, which alleged that it was prejudiced by the Government's failure to disclose the existence of mass-haul diagrams showing the location and quantities of excavation, fill and waste, but which made no inquiry therefor, was not warranted in assuming by virtue of a contract drawing of a "typical" section with cut and fill approximately balancing, the roadway as constructed would be a balanced half-cut, half-fill, "simple" road, where a profile drawing of the roadway revealed numerous sections of cuts and fills at centerline, the contract provided for payment for overhaul of excavation for the roadway beyond a free haul distance of 1000 feet,

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and an adequate site investigation and examination of other contractual data all should have indicated to the contrary, since a typical section by accepted practice is not intended to show a specific relationship between the amounts of cut and fill to be expected at a given location-----

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3. Where a contractor under a contract for the construction of a tunnel, which provided that cavities or fissures may be encountered, in the course of excavation in limestone found and was required to fill in solution caverns (the presence of which in limestone is common) with grout and grout sand, the existence of such caverns did not constitute a changed condition. Utilization of the grout and grout sand, rather than concrete, to fill in the voids was contemplated by the contract and was not an attempt by the Government to take unreasonable advantage of the contractor's erroneously low bid for grout sand, the correction of which is beyond the Board's jurisdiction----

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**Changed Conditions (Dif-
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5. Under a contract for the construction of a dam and other related work, providing that a certain borrow area contained materials of a quality suitable for processing to meet the requirements of the specifications for coarse aggregate, and authorizing the contractor to furnish such material from other sources, the contractor's claim for the cost of processing such material, submitted on the theory that the Government misrepresented the suitability of the specified source and that the condition of the borrow area differed materially from that indicated in the contract, is denied, since processing was expressly contemplated by the contract and the contractor neither sought nor needed to procure such material from the other available sources--

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- edgment of Government responsibility for the direct consequences of the erroneous staking and it was therefore inconsistent to include the dewatering costs but not to compensate for the backfilling as well ----- 158
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and waste, but which made no inquiry therefor, was not warranted in assuming by virtue of a contract drawing of a "typical" section with cut and fill approximately balancing, the roadway as constructed would be a balanced half-cut, half-fill, "simple" road, where a profile drawing of the roadway revealed numerous sections of cuts and fills at centerline, the contract provided for payment for overhaul of excavation for the roadway beyond a free haul distance of 1000 feet, and an adequate site investigation and examination of other contractual data all should have indicated to the contrary, since a typical section by accepted practice is not intended to show a specific relationship between the amounts of cut and fill to be expected at a given location-----

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5. Where a contractor under a contract for the construction of a tunnel, which provided that cavities or fissures may be encountered, in the course of excavation in limestone found and was required to fill in solution caverns (the presence of which in limestone is common) with grout and grout sand, the existence of such caverns did not constitute a changed condition. Utilization of the grout and grout sand, rather than concrete, to fill in the voids was con-

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templated by the contract and was not an attempt by the Government to take unreasonable advantage of the contractor's erroneously low bid for grout sand, the correction of which is beyond the Board's jurisdiction-----

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6. A contract for the construction of a dam and other related work which afforded the Government the right to design, test, adjust and control the concrete mixes necessary for construction, should be regarded as containing an implicit requirement that such right be exercised with reasonable regard for the pumpability and placeability of the mixes designed. Where the record established that the Government did not take those factors sufficiently into account with respect to certain mixes, a constructive change occurred and the contractor is entitled to be compensated for the delay and disruption of its work resulting therefrom-----

161

7. A claim prosecuted by a grading subcontractor in the name of the prime contractor and based upon the alleged improper refusal by a resident engineer to approve a borrow pit for use within a reasonable scraper haul of fill areas requiring the use of borrow is denied where the grading subcontractor failed to follow known and established procedures for ob-

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taining timely review of the resident engineer's decision by the district engineer before the borrow forming the basis of the claim was placed, thereby foreclosing the Government from exercising options which would otherwise have been available to it and which the procedures established for review of subordinate's decisions were designed to secure.

466

8. Where a contract bid invitation provided for alternative methods for the construction of a road, and the specifications required the placement of 4 inches of surfacing material instead of the 6 inches shown in the plans without indicating any change in elevation or in the specified cross-section profiles, the contractor's action to substantially complete the subgrade elevation 2 inches higher in order to achieve the same finished surface elevation and the acquiescence of the Government supervisor constituted a contemporaneous interpretation of ambiguous specifications. The ambiguity having been resolved by conduct of the parties amounting to an agreed upon, reasonable interpretation of the specifications, subsequent directions by the Government to change the subgrade elevation were compensable contract changes.

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CONSTRUCTION AND OPERA-
TION—Continued**

Contracting Officer

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1. Where in the course of an extended hearing of an appeal by a contractor under a contract for the construction of a dam and related work, substantial testimony was taken, accompanied by the introduction of numerous exhibits, without objection by the Government, in connection with certain claims relating to allegedly harsh and unworkable concrete ordered by the Government, only some of which were expressly considered by the contracting officer in his various findings of fact, a remand of the unconsidered claims to the contracting officer for additional findings is not required.

161

2. A claim prosecuted by a grading subcontractor in the name of the prime contractor and based upon the alleged improper refusal by a resident engineer to approve a borrow pit for use within a reasonable scraper haul of fill areas requiring the use of borrow is denied where the grading subcontractor failed to follow known and established procedures for obtaining timely review of the resident engineer's decision by the district engineer before the borrow forming the basis of the claim was placed, thereby foreclosing the Government from exercising options which

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would otherwise have been available to it and which the procedures established for review of subordinate's decisions were designed to secure...

466

Drawings and Specifications

1. Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government first erroneously staked the depth of the trench to 28 feet and thereafter to 42 feet before rock was ultimately reached at 60 feet, and the contracting officer issued a change order to compensate the contractor for certain additional expenses caused thereby, including the increased cost of dewatering the trench at the specified depth, but refused to provide for the increased cost of backfilling on the ground that the contractor was charged at the prebidding stage with the knowledge that backfilling would be required at the 60 foot depth, the contractor was also entitled to an equitable adjustment for its additional cost of backfilling resulting therefrom. The issuance of the change order constituted an acknowledgment of Government responsibility for the direct consequences of the erroneous staking and it was therefore inconsistent to include the

**CONTRACTS—Continued
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TION—Continued**

Drawings and Specifications—Continued

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dewatering costs but not to compensate for the backfilling as well.....

158

2. A provision, under a contract for the construction of a dam, a key feature of which called for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be 60 feet), which permitted the Government to vary the slopes, grades or dimensions of the excavations from those specified when necessary or desirable was not intended to apply to major revisions associated with correcting the erroneous staking of the trench to depths of 28 feet and 42 feet, respectively, where the serious difficulties encountered in reaching the depth specified could not be regarded as having resulted from a mere variation.....

159

3. Under a provision relating to borrow operations, of a contract for the construction of a dam, which required the contractor to (i) develop and submit for approval a plan for the production of proper proportions of Zone 1, 2 and 3 materials and (ii) irrigate Zone 1 material in borrow pits at least 30 days prior to anticipated use, and which authorized the Government to designate limits or locations of borrow pits in the borrow areas designated, upon a failure of the contractor to submit such a plan prior to commencement

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of borrow operations and of irrigate 30 days in advance, the Government was entitled to issue direction for the development, use and irrigation of the borrow areas and such directions did not constitute a compensable change or relieve the contractor of its contractual responsibilities-----

159

4. Where a contract for the construction of a road indicated that the material to be excavated in roadway excavation was unclassified and the specifications and logs of exploration of test pits referred to the existence of rock at the site, a contractor was unwarranted in assuming that roadway excavation came within the definition of common excavation, which excluded rock, and that rock would not be encountered in such excavation-----

160

5. A contractor under a contract for the construction of a road, which alleged that it was prejudiced by the Government's failure to disclose the existence of mass-haul diagrams showing the location and quantities of excavation, fill and waste, but which made no inquiry therefor, was not warranted in assuming by virtue of a contract drawing of a "typical" section with cut and fill approximately balancing, the roadway as constructed would be a balanced half-cut, half-fill, "simple" road, where a profile drawing of the

CONTRACTS—Continued
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Drawings and Specifica-
tions—Continued

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roadway revealed numerous sections of cuts and fills at centerline, the contract provided for payment for overhaul of excavation for the roadway beyond a free haul distance of 1000 feet, and an adequate site investigation and examination of other contractual data all should have indicated to the contrary, since a typical section by accepted practice is not intended to show a specific relationship between the amounts of cut and fill to be expected at a given location-----

160

6. Under a contract for the construction of a dam and other related work, providing that a certain borrow area contained materials of a quality suitable for processing to meet the requirements of the specifications for coarse aggregate, and authorizing the contractor to furnish such material from other sources, the contractor's claim for the cost of processing such material, submitted on the theory that the Government misrepresented the suitability of the specified source and that the condition of the borrow area differed materially from that indicated in the contract, is denied, since processing was expressly contemplated by the contract and the contractor neither sought nor needed to procure such material from the other available sources-----

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CONTRACTS—Continued
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TION—Continued

Drawings and Specifica-
tions—Continued

7. A contract for the construc-
tion of a dam and other
related work which af-
forded the Government
the right to design, test,
adjust and control the
concrete mixes necessary
for construction, should
be regarded as containing
an implicit requirement
that such right be exer-
cised with reasonable re-
gard for the pumpability
and placeability of the
mixes designed. Where
the record established
that the Government did
not take those factors
sufficiently into account
with respect to certain
mixes, a constructive
change occurred and the
contractor is entitled to
be compensated for the
delay and disruption of
its work resulting there-
from.....

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161

8. A contractor whose work was
disrupted and damaged
as a result of the bursting
of an oil pipeline (owned
by a third party), which
ran under the contract
site and over which the
contractor had, with the
Government's approval,
located its concrete
batching plant, was not
entitled to be compensated
by the Government for
the damage sustained on
the ground that the dam-
age resulted from the
Government's failure to
discharge its implied con-
tractual obligation to pro-
vide a proper and safe
construction site, in the
absence of proof that the
Government was respon-

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TION—Continued

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tions—Continued

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- sible for the bursting,
since the contractor bore
the risk of loss under the
Permits and Responsi-
bilities clause of the con-
tract.....
9. Where a contract bid invi-
tation provided for al-
ternative methods for the
construction of a road,
and the specifications re-
quired the placement of 4
inches of surfacing ma-
terial instead of the 6
inches shown in the plans
without indicating any
change in elevation or in
the specified cross-section
profiles, the contractor's
action to substantially
complete the subgrade
elevation 2 inches higher
in order to achieve the
same finished surface ele-
vation and the acquies-
cence of the Government
supervisor constituted a
contemporaneous inter-
pretation of ambiguous
specifications. The ambi-
guity having been re-
solved by conduct of the
parties amounting to an
agreed upon, reasonable
interpretation of the
specifications, subsequent
directions by the Govern-
ment to change the sub-
grade elevation were com-
pensable contract
changes.....

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General Rules of
Construction

1. A provision, under a contract
for the construction of a
dam, a key feature of
which called for excava-
tion of a cutoff trench to
sound rock (shown on the
plans and specifications

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TION—Continued

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tion—Continued

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to be 60 feet), which permitted the Government to vary the slopes, grades or dimensions of the excavations from those specified when necessary or desirable[®] was not intended to apply to major revisions associated with correcting the erroneous staking of the trench to depths of 28 feet and 42 feet, respectively, where the serious difficulties encountered in reaching the depth specified could not be regarded as having resulted from a mere variation-----

159

2. Where a contract for the construction of a road indicated that the material to be excavated in roadway excavation was unclassified and the specifications and logs of exploration of test pits referred to the existence of rock at the site, a contractor was unwarranted in assuming that roadway excavation came within the definition of common excavation, which excluded rock, and that rock would not be encountered in such excavation-----

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3. A contractor under a contract for the construction of a dam whose claims fall within the purview of the Changes and Changed Conditions clauses and who asserts that its records provide a proper basis for evaluating costs of labor and materials but that its equipment records are incomplete,

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TION—Continued

General Rules of Construc-
tion—Continued

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is not entitled to recover such equipment costs pursuant to a clause of the contract providing that any allowance for equipment used in performing extra work shall be determined from the schedule of average ownership expense listed in "Contractors' Equipment Ownership Expense" published by the Associated General Contractors of America, where the provision also states that the application of such allowances to changes ordered pursuant to the Changes and Changed Conditions clauses is optional with the contracting officer and the evidence in the record provides a more suitable basis for establishing the contractor's equipment costs-----

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Notices

1. A motion to dismiss will be granted where the record on the motion shows that the Government has been prejudiced by the contractor's delay of at least nine years in presenting notices of claims, or by failing to present to the contracting officer for that period of time data with respect to claims as to which notice was initially given. *Eggers & Higgins v. United States*, 185 Ct. Cl. 765 (1968)-----
2. A claim prosecuted by a grading subcontractor in the name of the prime contractor and based upon the alleged improper

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refusal by a resident engineer to approve a borrow pit for use within a reasonable scraper haul of fill areas requiring the use of borrow is denied where the grading subcontractor failed to follow known and established procedures for obtaining timely review of the resident engineer's decision by the district engineer before the borrow forming the basis of the claim was placed, thereby foreclosing the Government from exercising options which would otherwise have been available to it and which the procedures established for review of subordinate's decisions were designed to secure.....

466

Payments

1. Where neither the contractor's obligations nor the Government's rights under warranty and guarantee clauses were dependent on a withholding of money, a withholding for the purpose of compelling the contractor to comply with Government directives under warranty and guarantee clauses was improper. A withholding insofar as based on the contractor's failure to furnish all "as built" drawings required by the contract was held to be proper.....

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1. A contractor under a contract for the construction of a dam, which provides that progress payments

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TION—Continued

Payments—Continued

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will be made to the contractor on estimates approved by the contracting officer, was not entitled to discontinue work on the ground that the Government's progress payments were allegedly erroneous and inadequate since implicit in the term "estimate" is lack of finality and the possibility of further revision. Where the parties are in serious disagreement over the validity of claims submitted by the contractor or as to the amounts owed for changes, extra work, etc., it is to be expected that progress payments will correspond to the amounts which the contracting officer determines are owed by the Government.....

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Subcontractors and Suppliers

1. A claim prosecuted by a grading subcontractor in the name of the prime contractor and based upon the alleged improper refusal by a resident engineer to approve a borrow pit for use within a reasonable scraper haul of fill areas requiring the use of borrow is denied where the grading subcontractor failed to follow known and established procedures for obtaining timely review of the resident engineer's decision by the district engineer before the borrow forming the basis of

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Subcontractors and Sup-
pliers—Continued

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the claim was placed, thereby foreclosing the Government from exercising options which would otherwise have been available to it and which the procedures established for review of subordinate's decisions were designed to secure...

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Warranties

1. Where neither the contractor's obligations nor the Government's rights under warranty and guarantee clauses were dependent on a withholding of money, a withholding for the purpose of compelling the contractor to comply with Government directives under warranty and guarantee clauses was improper. A withholding insofar as based on the contractor's failure to furnish all "as built" drawings required by the contract was held to be proper.....

125

2. Where the evidence failed to establish that various malfunctions in fire alarm systems installed by the contractor were the contractor's responsibility under warranty and guarantee clauses, a site visit and work performed by the contractor during such visit pursuant to directives of the contracting officer constituted compensable work.....

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3. An appeal claiming the costs of repair of corrosion in four stainless steel clad surge tanks is denied where the Government

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has discharged its burden in showing by a preponderance of the evidence of record that the most probable causes of corrosion were welding defects, not allowed by the specifications, and contractor's failure to protect the interiors of the tanks from weld and gouge spatter.....

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4. The Government's remedies under an express warranty extending for three years after acceptance of the work are not vitiated by inspection and acceptance barring all but latent defects since warranty remedies are cumulative..

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DISPUTES AND REMEDIES

Generally

1. A motion to dismiss will be granted where the record on the motion shows that the Government has been prejudiced by the contractor's delay of at least nine years in presenting notices of claims, or by failing to present to the contracting officer for that period of time data with respect to claims as to which notice was initially given. *Eggers & Higgins v. United States*, 185 Ct. Cl. 765 (1968)...
2. Where claims presented on appeal by the contractor are in fact claims of subcontractors which, on the record, appear barred as enforceable claims against the contractor by a state statute of limitations, they will be dismissed...

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DISPUTES AND REMEDIES—Con.

Appeals

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1. Where claims presented on appeal by the contractor are in fact claims of sub-contractors which, on the record, appear barred as enforceable claims against the contractor by a state statute of limitations, they will be dismissed... 57
2. In the absence of a Board rule requiring that the Board member who presided at the hearing of an appeal prepare or participate in the decision, the failure of the Board to assign the preparation of an opinion to a retired, former member who conducted the hearing is not a violation of a contractor's constitutional rights, even where credibility and the demeanor of witnesses are in issue, since procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the members of the Board rendering the decision... 158
3. A claim to compensate a contractor, for the cost of additional grouting delayed is dismissed where there is insufficient evidence in the record to support a finding that the grouting work was changed by the erroneous staking of a cutoff trench since the delay in grouting was caused by the delay in completing excavation of the trench for which no relief is available under the contract, in the ab-

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- sence of a suspension of work clause..... 159
 4. Where in the course of an extended hearing of an appeal by a contractor under a contract for the construction of a dam and related work, substantial testimony was taken, accompanied by the introduction of numerous exhibits, without objection by the Government, in connection with certain claims relating to allegedly harsh and unworkable concrete ordered by the Government, only some of which were expressly considered by the contracting officer in his various findings of fact, a remand of the unconsidered claims to the contracting officer for additional findings is not required..... 161
- Burden of Proof**
1. A claim to compensate a contractor for, the cost of additional grouting delayed is dismissed where there is insufficient evidence in the record to support a finding that the grouting work was changed by the erroneous staking of a cutoff trench since the delay in grouting was caused by the delay in completing excavation of the trench for which no relief is available under the contract, in the absence of a suspension of work clause. 159
 2. Where a contractor under a contract calling for the construction of a tunnel and an access shaft ex-

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tending 200 feet downward from ground surface to the gate chamber in the tunnel excavated the shaft by means of blasting, and subsequently the Government redesigned the shaft, in part due to a funnel-shaped excavation caused by the contractor's blasting technique, the contractor is not entitled to be compensated for the cost of refilling the funnel-shaped excavation since the record does not establish that such cost is attributable to a changed condition rather than to the contractor's blasting methods.-----

160

3. A contractor whose work was disrupted and damaged as a result of the bursting of an oil pipeline (owned by a third party), which ran under the contract site and over which the contractor had, with the Government's approval, located its concrete batching plant, was not entitled to be compensated by the Government for the damage sustained on the ground that the damage resulted from the Government's failure to discharge its implied contractual obligation to provide a proper and safe construction site, in the absence of proof that the Government was responsible for the bursting, since the contractor bore the risk of loss under the Permits and Responsibilities clause of the contract.-----

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4. A contractor in an appeal having a massive record, who alleges instances of inadequate payment under a contract for the construction of a dam, and in support thereof introduces into evidence various Government payment books unpaginated and some seven inches in thickness without clearly establishing such allegations by further specification or identification in such books, has not sustained its burden of proof, since it was not incumbent upon the Board to search the record "for errors that may be lurking among the labyrinths"---

162

5. An appeal claiming the costs of repair of corrosion in four stainless steel clad surge tanks is denied where the Government has discharged its burden in showing by a preponderance of the evidence of record that the most probable causes of corrosion were welding defects, not allowed by the specifications, and contractor's failure to protect the interiors of the tanks from weld and gouge spatter.-----

547

6. The contracting officer's determination of the hours properly chargeable to the Government under a rental of equipment contract will be sustained where the contractor asserts that the hours claimed are reflected in its records but fails to offer any evidence in support of the claims made.-----

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DAMAGES

Measurement

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1. A contractor under a contract for the construction of a dam whose claims fall within the purview of the Changes and Changed Conditions clauses and who asserts that its records provide a proper basis for evaluating costs of labor and materials but that its equipment records are incomplete, is not entitled to recover such equipment costs pursuant to a clause of the contract providing that any allowance for equipment used in performing extra work shall be determined from the schedule of average ownership expense listed in "Contractors' Equipment Ownership Expense" published by the Associated General Contractors of America, where the provision also states that the application of such allowances to changes ordered pursuant to the Changes and Changed Conditions clauses is optional with the contracting officer and the evidence in the record provides a more suitable basis for establishing the contractor's equipment costs-----

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Equitable Adjustments

1. Recovery by a contractor under a contract for the construction of a dam who alleged that all of its claims against the Government were inseparable and that payment should be made on the basis of its total expenditures less

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Equitable Adjustments—Con.

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contract receipts is denied where the contractor's records were such that allocation of costs to specific claims could be made and the reasonableness of such total costs and the Government's responsibility therefor were not established. In such circumstances the Board found that resort to the jury verdict approach for determining the amount of the equitable adjustment was warranted, since the Government's evidence respecting costs was also not segregated to specific claims-----

163

2. A contractor under a contract for the construction of a dam whose claims fall within the purview of the changes and changed Conditions clauses and who asserts that its records provide a proper basis for evaluating costs of labor and materials but that its equipment records are incomplete, is not entitled to recover such equipment costs pursuant to a clause of the contract providing that any allowance for equipment used in performing extra work shall be determined from the schedule of average ownership expense listed in "Contractors' Equipment Ownership Expense" published by the Associated General Contractors of America, where the provision also states that the application of such allowances

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to changes ordered pursuant to the Changes and Changed Conditions clauses is optional with the contracting officer and the evidence in the record provides a more suitable basis for establishing the contractor's equipment costs----- 163

Jurisdiction

1. In the absence of a contract provision authorizing a contract price adjustment for delay, claims for pay-for-delay are breach of contract claims not within the Board's jurisdiction----- 57
2. Where an appeal record disclosed the existence of various disputes clearly cognizable under specific provisions of a contract for the construction of a dam, the Board is not deprived of jurisdiction over such disputes by virtue of the contractor's contention that they merged into and became part of a unitary, integrated claim for a "cardinal breach" arising out of the Government's course of conduct for which only the Court of Claims could grant adequate relief, since it is not for a board of contract appeals to determine that the cumulative effect of claims redressable under various contract clauses, combined with other acts and non-acts of the Government traditionally regarded as breaches of contract, constitute a unitary, integrated claim for a breach of contract----- 158

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3. A claim to compensate a contractor, for the cost of additional grouting delayed is dismissed where there is insufficient evidence in the record to support a finding that the grouting work was changed by the erroneous staking of a cutoff trench since the delay in grouting was caused by the delay in completing excavation of the trench for which no relief is available under the contract, in the absence of a suspension of work clause----- 159
4. Where a contractor under a contract for the construction of a tunnel, which provided that cavities or fissures may be encountered, in the course of excavation in limestone found and was required to fill in solution caverns (the presence of which in limestone is common) with grout and grout sand, the existence of such caverns did not constitute a changed condition. Utilization of the grout and grout sand, rather than concrete, to fill in the voids was contemplated by the contract and was not an attempt by the Government to take unreasonable advantage of the contractor's erroneously low bid for grout sand, the correction of which is beyond the Board's jurisdiction----- 160
5. Claims for costs attributed to Government delays in relocating utility poles and in providing slope stakes arising on a proj-

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ect for the construction of a portion of the Nat-chez Trace Parkway (together with a derivative claim for stretch-out and other delay costs) are dismissed as not within the purview of the Board's jurisdiction absent a pay-for-delay provision in the contract under which the claims would be cognizable.....

465

6. Where four claims are asserted affirmatively for the first time in a notice of appeal and where thereafter the contractor fails to appeal the subsequent decision of the contracting officer denying the claims so asserted, the contracting officer's decision is final and conclusive under the express language of the Disputes Clause thereby requiring the dismissal of the four claims for lack of jurisdiction.....

607

7. A claim asserted under the Suspension of Work clause for costs arising out of a delay in performance of a construction contract caused by the exhaustion of available funds following the Government's failure to appropriate additional moneys necessary to enable a contractor to complete the work prior to the time established by the contract and the President's subsequent impounding of such funds, which resulted in the contractor's election to

CONTRACTS—Continued
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Jurisdiction—Continued

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stop work, was dismissed as being outside the Board's jurisdiction since the contract provided that the Government's liability for work costing in excess of a specified amount reserved and available for payment was contingent upon further appropriations and reservation, and the President's action was a sovereign act taken to halt inflation, neither of which is considered to be a stoppage by actual or constructive direction of the contracting officer in the administration of the contract within the meaning of the Suspension of Work clause.....

644

Substantial Evidence

1. The contracting officer's determination of the hours properly chargeable to the Government under a rental of equipment contract will be sustained where the contractor asserts that the hours claimed are reflected in its records but fails to offer any evidence in support of the claims made.....

607

Termination for Default

1. Where the default determination decision is appealed and held to be improper, the Government is without contractual authority under the Default Article to charge express costs to the contractor without regard to whether a later decision assessing excess costs was appealed.....

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DISPUTES AND REMEDIES—Con.
Termination for Default—
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2. A contractor under a contract for the construction of a dam, which provides that progress payments will be made to the contractor on estimates approved by the contracting officer, was not entitled to discontinue work on the ground that the Government's progress payments were allegedly erroneous and inadequate since implicit in the term "estimate" is lack of finality and the possibility of further revision. Where the parties are in serious disagreement over the validity of claims submitted by the contractor or as to the amounts owed for changes, extra work, etc., it is to be expected that progress payments will correspond to the amounts which the contracting officer determines are owed by the Government..... 162
3. Where a contractor discontinued its work under a contract for the construction of a dam because the Government had allegedly breached the contract by failing to (1) make timely and adequate payments, (2) process claims promptly, (3) consider the claim on a unitary basis, and (4) grant adequate relief, the contracting officer was justified in terminating the contract for default, since a contractor is not permitted under the Disputes clause to abandon

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Termination for Default—
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its work because of disagreement with the contracting officer's determinations and the record establishes that payments were made in accordance with the contract and the delay in processing claims and providing administrative relief was found to be largely attributable to the actions of the contractor..... 162

FORMATION AND VALIDITY

Bid Award

1. The competitive bidding requirement in the Outer Continental Shelf Lands Act for awarding oil and gas or sulfur leases is satisfied by due advertisement and a giving of an opportunity to bid, and contemplates that all bidders be placed upon the same plane of equality, and that they each bid upon the same terms and conditions set forth in the advertisements, and the pertinent statutes and in the Department's regulations. Competitive bidding does not require that more than one bid be submitted before the authorized officer, but only that the officer, by due advertisement, give opportunity for everyone to bid..... 596

Mistakes

1. Where a contractor under a contract for the construction of a tunnel, which provided that cavities or fissures may be encountered, in the course of excavation in limestone

CONTRACTS—Continued
FORMATION AND VALIDITY—
Continued

Mistakes—Continued

found and was required to fill in solution caverns (the presence of which in limestone is common) with grout and grout sand the existence of such caverns did not constitute a changed condition. Utilization of the grout and grout sand, rather than concrete, to fill in the voids was contemplated by the contract and was not an attempt by the Government to take unreasonable advantage of the contractor's erroneously low bid for grout sand, the correction of which is beyond the Board's jurisdiction.-----

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PERFORMANCE OR DEFAULT
Generally

1. The contracting officer's decision to partially terminate for default a supply contract by reason of defects alleged to exist in delivered equipment will be deemed improper where the equipment conforms to the contract requirements and the failure of the equipment to operate fully to the satisfaction of the Government is found to be caused by voltage variations in excess of specification limits.-----

94

Breach

1. Where an appeal record disclosed the existence of various disputes clearly cognizable under specific provisions of a contract for the construction of a dam, the Board is not deprived of jurisdiction over

CONTRACTS—Continued
PERFORMANCE OR DEFAULT
Continued

Breach—Continued

such disputes by virtue of the contractor's contention that they merged into and became part of a unitary, integrated claim for a "cardinal breach" arising out of the Government's course of conduct for which only the Court of Claims could grant adequate relief, since it is not for a board of contract appeals to determine that the cumulative effect of claims redressable under various contract clauses, combined with other acts and non-acts of the Government traditionally regarded as breaches of contract, constitute a unitary, integrated claim for a breach of contract.-----

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2. Where a contractor discontinued its work under a contract for the construction of a dam because the Government had allegedly breached the contract by failing to (1) make timely and adequate payments, (2) process claims prompt (3) consider the claim, on a unitary basis, and (4) grant adequate relief, the contracting officer was justified in terminating the contract for default, since a contractor is not permitted under the Disputes clause to abandon its work because of disagreement with the contracting officer's determinations and the record establishes that payments were made in accordance with the contract and the delay in processing claims and providing administra-

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tive relief was found to be largely attributable to the actions of the contractor.....

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Excusable Delays

1. Where the Government was found to be responsible for an indeterminate portion of a delay in having utility poles relocated on a road construction job and information having a direct bearing on the propriety of the amount of liquidated damages assessed was either in the possession of the Government or more accessible to it than it was to the appellant, no attempt should be made to apportion the delay between the parties and the Board therefore holds that the appellant is entitled to have the contract time extended to the date the contract was determined to be substantially complete.....

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1. The Government's remedies under an express warranty extending for three years after acceptance of the work are not vitiated by inspection and acceptance barring all but latent defects since warranty remedies are cumulative.....

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Suspension of Work

1. A claim asserted under the Suspension of Work clause for costs arising out of a delay in performance of a construction contract caused by the exhaustion of available funds following the Government's failure to ap-

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propriate additional moneys necessary to enable a contractor to complete the work prior to the time established by the contract and the President's subsequent impounding of such funds, which resulted in the contractor's election to stop work, was dismissed as being outside the Board's jurisdiction since the contract provided that the Government's liability for work costing in excess of a specified amount reserved and available for payment was contingent upon further appropriations and reservation, and the President's action was a sovereign act taken to halt inflation, neither of which is considered to be a stoppage by actual or constructive direction of the contracting officer in the administration of the contract within the meaning of the Suspension of Work clause.....

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1. Private agreements do not control the disposition of federal public land. Rights to federal lands must be gained by compliance with the governing federal public land laws.....
2. Any right under a notice of location required by the Act of April 29, 1950, is personal to the claimant filing the notice. A transferee of the claimant's possessory interest in a trade and manufac-

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turing site cannot claim under his transferor's notice to avoid the effect of a withdrawal where the transferee had not filed his own notice or purchase application prior to the withdrawal-----

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1. Public access to government information storage output restricted to visual inspection where the data input is accepted from private parties with tacit recognition of use limitations they set based on their copyrights in such data-----

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COURTS

1. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit, the leased lands are situated in whole or in part on the known geologic structure of a producing oil or gas field, and the lease terms and factual circumstances are identical to those in the decision, *Standard Oil Company of California, et al.*, 76 I.D. 271 (1969), this Department will follow the ruling by the United States Court of Appeals for the Ninth Circuit in *Standard Oil Company of California v. Morton*, 450 F.2d 493 (1971), which overturned that decision solely upon principles of contract construction; therefore, the eliminated lands will retain the rental rate applicable to non-participating acreage within the unit rather than the higher rate applicable to

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non-unitized lands within a known geologic structure-----

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2. The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed-----

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1. The definition of "working place" in section 318(g) (2) of the Act means inby the interior-most rib or wall of the last open crosscut-----

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1. In proving a violation of section 304(c) (based on the absence of rock dust) the Bureau must first prove by a preponderance of the evidence that rock dust was required, i.e., that none of the exceptions in section 304(c) apply. When the exception involves specifically delineated percentages of incombustible dust content, proof that it does not apply should

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1. An order of withdrawal for imminent danger may be validly issued for conditions and practices not constituting violations, and it may also be true that violations specified in such an order may be valid and subject to penalty assessments but may not constitute imminent danger-----

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Discharge

Burden of Proof

1. It must be proved by a preponderance of the evidence that an operator who has discharged a miner knew or believed that such miner had reported or instigated reports of alleged violations or dangers to the Secretary or his authorized representative, in order to establish a violation of subsection 110(b)(1)(A) of the Act--

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Discharge—Continued

Burden of Proof—Con.

2. Where the evidence supports findings of fact and inferences that miners were discharged by an operator by reason of the fact that the miners acted in concert to report an alleged danger at a coal mine construction site through the union safety coordinator to a Federal mine inspector, the miners have established a violation of section 110(b)(1)(A) of the Act and are entitled to reinstatement and back pay-----

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Elements of Proof

1. The elements of proof of a violation of subsection 110(b)(1)(A) of the Act are: (1) that a miner has reported to the Secretary or an authorized representative of the Secretary an alleged violation or danger in a coal mine; (2) that after such reporting occurred, such miner was discharged from his employment; and (3) that such discharge was motivated by reason of such reporting and not for some other reason-----
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| 5. Notices of violation of section 304(c) of the Act based entirely on the visual observation of the inspector are unsupported by probative evidence and must be vacated.... | 723 |
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MANDATORY SAFETY STANDARDS
Generally

1. Where 30 CFR 75.1403-7(d) was subject to the injunction in *Ratliff v. Hickel*, Civil Action No. 70-C-50-A (W.D., Va., April 23, 1970), the inspector should have notified the operator to properly connect chains between man-trip cars, but he should not have issued a notice of violation of section

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- 314(b) to circumvent the injunction. 736
2. Where an operator is charged with a duty of inspection of a high-voltage cable in an entry, the entry constitutes an active working, and it is subject to the requirements of 30 CFR 75.400. 737
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**MODIFICATION OF APPLICATION OF
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1. An operator's petition for the modification of the application of a mandatory safety standard will be denied where such petition is based solely upon the argument that the operator's mine is not gassy. 140

Interim Relief

1. The discretion of an Examiner or the Board to grant interim relief, pending adjudication of a section 301(c) petition for modification, may be exercised only after a hearing has been afforded the parties, and it clearly appears: (1) that the petition has been filed in good faith; (2) that during the interim, the health and safety of the miners will be reasonably assured; and (3) that the operator will suffer ir-

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GENERALLY**

1. An operator is entitled to adequate and timely notice of the section of the Act or mandatory standard alleged to be violated in order to prepare a defense in a proceeding for assessment of civil penalty.....
2. Section 304(a) and 304(d) of the Act were each designed for a distinct purpose and may be cited as independent violations.....

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Elements of Proof

1. Notices of violation of section 304(d) of the Act based entirely on a visual observation by the inspector are unsupported by probative evidence and must be vacated.....
2. Notices of violation of section 304(c) of the Act based entirely on the visual observation of the inspector are unsupported by probative evidence and must be vacated.....
3. In proving a violation of section 304(c) (based on the absence of rock dust) the Bureau must first prove by a preponderance of the evidence that rock dust was required, i.e., that none of the exceptions in section 304(c) apply. When the exception involves specifically delineated percentages of incombustible dust content,

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of the incombustible content of the dust.....

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1. The filing of a petition for modification by an operator should be a major consideration in determining the reasonableness of the time fixed for abatement of any alleged violation which relates to the safety standard sought to be modified.....

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1. *Ratliff v. Hickel*, Civil Action Number 70-C-50-A (W.D.VA., Filed April 23, and 30, 1970), is not a bar to assessment of penalties in this proceeding.....
2. The assessment of civil penalties under sec. 109 of the Act must be judged on the particular set of facts in each instance, and mitigation in one case may not warrant mitigation in another.....
3. Final authority to assess civil penalties is in the Board as the delegate of the Secretary of the Interior.....

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Generally

1. The payment of a proposed order of assessment is not an offer of compromise, and when such payment is made, it does not render notices of violation and notices of termination or abatement inadmissible as

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2. An operator may be liable for a civil penalty for the violation of a mandatory safety standard even though there is no showing of negligence on his part. Negligence is a factor to be considered in determining the *amount* of the penalty..... 731

3. Evidence of previous violations is admissible regardless of whether proposed assessments were paid because even though paid they are not offers of compromise. The Act requires that the operator's history of previous violations be considered in determining the amount of a penalty..... 731

4. In proving a violation of section 304(c) (based on the absence of rock dust) the Bureau must first prove by a preponderance of the evidence that rock dust was required, *i.e.*, that none of the exceptions in section 304(c) apply. When the exception involves specifically delineated percentages of incombustible dust content, proof that it does not apply should be based upon samples and tests of the incombustible content of the dust..... 731

Amounts

1. In determining the amount of a penalty, the absence of miners in the mine can be considered in weighing

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the seriousness of the
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Criteria

1. In applying the criteria of sec. 109, it is error when considering the operator's history of past violations for an Examiner to take into account the operator's failure to abate a violation within the time set in the Notice of Violation..... 657

2. In applying the criteria of sec. 109 of the Act, it is error for an Examiner to conclude that the operator demonstrated a lack of good faith as to each violation solely on the basis that the violation was not abated within the time set in the original Notice of Violation.... 657

3. While the failure of an operator to abate upon proper notice may reflect upon his good faith in complying with the mandatory standards, such failure is not an element to be considered in determining an operator's negligence in permitting violations to occur..... 657

4. Each violation of sec. 109 of the Act should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring..... 657

Evidence

1. A notice charging violation of sec. 305(g) of the Act must be supported by facts from which a conclusion can be drawn as

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2. Where Congress has specified the percentages of incombustible material allowable in sec. 304(d) of the Act, it is necessary for the Bureau of Mines to present probative evidence—more than a mere visual observation of the inspector.....	668
3. In the absence of evidence, such as business and tax records, showing that a penalty under sec. 109 of the Act will affect the ability of the operator to stay in business, a presumption exists that the operator will not be so affected.....	658
Existence of Violation	
1. The criteria prescribed in section 109(a) of the Act and 30 CFR 4.546(a) are not considered in finding a violation of the Act....	625
2. An order of withdrawal for imminent danger may be validly issued for conditions and practices not constituting violations, and it may also be true that violations specified in such an order may be valid and subject to penalty assessments but may not constitute imminent danger.....	723
3. The mere presence of an excessive accumulation of methane does not constitute a violation of section 303(h)(2) of the Act.....	723

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4. Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation.....	736
5. Failure by an operator upon becoming aware of the presence of 1.0 volume per centum or more of methane at a working place to do any of the following would violate section 303(h)(2): <i>first</i> , to make immediate changes or adjustments in the ventilation of the mine; <i>second</i> , to cut off power to electric face equipment located in the affected area while adjustments are being made in the ventilation; <i>third</i> , to stop all work immediately in the affected area; <i>fourth</i> , to take precautions so as to prevent other areas of the mine from becoming endangered; <i>fifth</i> , to withdraw all persons except those referred to in section 104(d) of the Act at any time that a working place contains 1.5 volume per centum or more of methane.....	736
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1. Mitigation of a penalty under section 109 of the Act is not a condonation of a violation.....	664
2. The Board, as in this case, may mitigate penalties imposed by an Examiner that are disproportionate to the violations involved in light of the six criteria established in sec. 109(a)	

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(1) of the Act, particularly considering that the infraction was a first offense, committed shortly after the effective date of the Act, by a small operator, who demonstrated good faith by immediate abatement.....

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Negligence

1. An operator can be liable for a civil penalty under section 109 of the Act even though there is no showing of negligence on his part. Negligence is considered solely in determining the amount of the penalty.....

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Reasonableness

1. Where, numerous violations are found and cited, the aggregate amount of the proposed assessment may be unreasonable for no other reason than that the amount is beyond the operator's ability to pay.....

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Standards

1. The criteria prescribed in section 109(a) of the Act and 30 CFR 4.546(a) are not considered in finding a violation of the Act....

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Vacation

1. Where the Secretary has not promulgated regulations concerning approved recording books required in sec. 303(g) of the Act, and the operator's statement is unrefuted that he had made the air readings required therein, a Notice of Violation of that section will be vacated..

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1. Evidence obtained as a result of an inspection conducted under the authority of sec. 103 of the Federal Coal Mine Health and Safety Act of 1969, without the consent of the operator and without a search warrant, is admissible in an administrative proceeding.....

655

Timeliness of Filing

1. The 30-day time limit prescribed by section 105(a) of the Act for filing applications for review is a limitation on the Secretary's jurisdiction. An application received more than thirty days after receipt of an order sought to be reviewed is not timely filed within the meaning of the Act and the Regulations.....
2. The right to have an action reviewed arises at the time of the cause of action, and if an operator's cause of action relates to an order of withdrawal, his time for filing for review of that order begins to run upon receipt of that order.....

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FEDERAL EMPLOYEES AND OFFICERS

AUTHORITY TO BIND GOVERNMENT

1. The action or inaction of Department employees cannot under the doctrines of estoppel or laches bar the Secretary of the Interior

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and his delegates from discharging their duty to determine if public lands have been omitted from an original survey and to survey those lands found to have been omitted-----

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2. A failure of Government officials to provide information that land was closed to mining locations cannot give life to invalid mining claims-----

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1. Employee-inventor's acceptance of government cash award given in consideration of his making invention would secure for the Government a right to use invention free from any further claim that might be based thereon; 5 U.S.C. sec. 2123(d) (1964)-----

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GRAZING PERMITS AND LICENSES—Continued
GENERALLY

1. When consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed-----

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2. Where an applicant for grazing privileges has failed to pay assessed damages for a grazing trespass which assessment has been affirmed by the Secretary of the Interior, a district manager properly conditioned approval of the applicant's application upon payment of his out-

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standing trespass damages. No license or permit will be issued or renewed until payment of any amount found to be due has been offered-----

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ADJUDICATION

1. A decision of a district manager which is arbitrary or capricious will not be sustained, when challenged by one who has standing, even in the absence of any evidence of serious economic impact. To that extent, *National Livestock Company and Zack Cox, I.G.D. 55 (1938)*, is overruled-----

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2. A decision involving the exercise of administrative discretion, which is supportable on any rational basis, is not arbitrary or capricious. An apportionment of the federal range, involving some abolition of "split-use" between states and based upon the effectuation of a management plan reasonably related to the protection of forage and other values, has, therefore, a rational basis and is not arbitrary or capricious-----

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1. The economic effect of the transfer, reduction or other change in grazing privileges of a particular range user is but one factor to be considered by the Board of Land Appeals in determining if a decision appealed from is unreasonable or should otherwise be reversed or modified-----

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2. When consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed. . . . 149
3. The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed. . . . 149

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RANGE**

1. A decision of a district manager which is arbitrary or capricious will not be sustained, when challenged by one who has standing, even in the absence of any evidence of serious economic impact. To that extent, *National Livestock Company and Zack Cox, I.G.D. 55* (1938), is overruled. . . . 109

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2. A decision involving the exercise of administrative discretion, which is supportable on any rational basis, is not arbitrary or capricious. An apportionment of the federal range, involving some abolition of "split-use" between states and based upon the effectuation of a management plan reasonably related to the protection of forage and other values, has, therefore, a rational basis and is not arbitrary or capricious. . . . 110
3. Elimination of a range user's so-called "split use" between two grazing districts by consolidation of his grazing privileges in a particular grazing district is reasonably incident to formulation and implementation of grazing management programs by the Bureau of Land Management and will be permitted to stand absent severe economic impact on the parties affected thereby. . . . 110
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1. Elimination of a range user's so-called "split use" between two grazing dis-

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districts by consolidation of his grazing privileges in a particular grazing district is reasonably incident to formulation and implementation of grazing management programs by the Bureau of Land Management and will be permitted to stand absent severe economic impact on the parties affected thereby 110

TRESPASS

1. Where an applicant for grazing privileges has failed to pay assessed damages for a grazing trespass which assessment has been affirmed by the Secretary of the Interior, a district manager properly conditioned approval of the applicant's application upon payment of his outstanding trespass damages. No license or permit will be issued or renewed until payment of any amount found to be due has been offered 149

2. The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay

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the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed 149

HEARINGS

(See also Administrative Procedure, Federal Coal Mine Health and Safety Act of 1969, Grazing Permits and Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act and Rules of Practice.)

1. Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 *et seq.* (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void *ab initio* for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970) 431A

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2. The Department of the Interior does not have the authority to declare a federal statute unconstitutional... 428
3. A determination of the heirs of a deceased Indian is controlling only as to the estate of the decedent, and the findings in each case must be supported by a preponderance of the evidence... 437
4. The Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) and the Acts which it amended are construed in *pari materia* with each other and with the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U.S.C. § 331 *et seq.*) as amended... 450
5. The Department of the Interior does not have authority to declare a statute of a state to be unconstitutional as being in violation of the constitution of the United States... 615

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105.1 Applicability to Indian Probate

1. Examiners must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 557 (1970) and include findings of fact and conclusions of law in their orders and decisions in Indian probate... 583

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105.2 Official Notice, Record Page

1. No official notice of records can be taken if such record is not introduced in evidence, or identified as required by the Administrative Procedure Act, 5 U.S.C. § 556(e) (1970) so as to be available subject to challenge by the aggrieved party... 583

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(See also Children, Adopted.)

110.0 Generally

1. Where the death of the decedent and the probate of his estate occurred prior to the effective date of 54 Stat. 746, 25 U.S.C. § 372a (1970), on January 8, 1941, a lack of a written record of an adoption completed during decedent's lifetime is no bar to recognition of such adoption in a proceeding to determine decedent's heirs... 619

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121.0 Generally

1. A petition to reopen an estate which has been closed more than three years will be summarily denied when neither the petition nor the record reveals that the petitioners have any interest in the estate... 619

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130.2 Dismissal

1. Timely service of a notice of appeal on all adverse parties is a jurisdictional requirement under the Indian probate regulations and failure of a party seeking an appeal to make such service will

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APPEAL—Continued

130.2 Dismissal—Continued Page

- result in dismissal of the appeal 14
- 2. A petition for rehearing which alleges newly discovered evidence as a basis for a rehearing and fails to set out any evidence or any other grounds which would require a rehearing does not meet the requirements of 43 CFR § 4.241 and an appeal from the denial of the petitioned rehearing will be dismissed 693
- 3. An appeal from the denial of a rehearing will be dismissed when a petition for rehearing, apparently based on newly discovered evidence, does not allege evidence of sufficient weight to cause a possible change in the original decision 697
- 4. A petition for rehearing, apparently based on newly discovered evidence, was properly denied when the petition, by not stating why such evidence was not discovered and presented at prior hearings, failed to comply with 43 CFR § 4.241(a) and an appeal from the denial will be dismissed 697

130.3 Examiner as Trier of Facts

- 1. Where there is sufficient evidence to support the finding and the testimony is conflicting, the determination of witness credibility and the findings of fact by the Examiner will not be disturbed because only he had the opportunity to hear and observe the witnesses 621

INDIAN PROBATE—Continued

APPEAL—Continued

130.5 Reconsideration Page

- 1. Ordinarily, a decision on appeal by the Board of Indian Appeals becomes a final Departmental decision and upon the issuance of such decision the parties are deemed to have exhausted their administrative remedies 108

130.7 Timely Filing

- 1. When a notice of appeal, postmarked a day after the expiration of the period, as extended, provided by regulation for filing an appeal, was not filed in the Judge's office until two days after the expiration of the period, as extended, the appeal is summarily dismissed as not timely filed 729

ATTORNEYS AT LAW

140.0 Generally

- 1. An attorney appearing in Indian Probate proceedings must disclose the name of the party represented by him 615
- 2. Misstatements of law and an erroneous statutory citation in a brief casts doubt on the merits of the appeal and the professional ability of the attorney who filed the brief 693

140.2 Fees

- 1. The allowance of attorney's fees is discretionary and based not only on the results produced but on what the services themselves are worth considering the labor, time, talent and skill the attorney expended 621

INDIAN PROBATE—Continued

BOARD OF INDIAN APPEALS

145.0 Generally

Page

1. When the Bureau of Indian Affairs petitions for the correction of an error in a probate order issued more than three years prior to the date of petition, the matter may be finally decided for the Department by the Board of Indian Appeals in the exercise of the discretion reserved by the Secretary in 25 CFR 1.2 and delegated to the Board in 43 CFR 4.242(h)----- 450

CHILDREN, ILLEGITIMATE

160.1 Right to Inherit

160.1.3 Child from Father

1. Once a child has been determined to be a child of a deceased Indian, Title 25 U.S.C. § 371 applies and authorizes the descent of its deceased father's lands to the child as an heir whether the parents of the child cohabited or not----- 621

CLAIM AGAINST ESTATE

165.1 Allowable Items

1. A claim for attorney's fees is not allowable as a charge against the estate where the services were performed on behalf of the attorney's client and were neither on behalf of the estate nor of benefit to the estate----- 404
2. A claim for attorney's fees by an attorney who successfully represented a client whose interests were in opposition to creditors of the estate and the heir at law is a private business matter with his client and not a

INDIAN PROBATE—Continued

CLAIM AGAINST ESTATE—Con.

165.1 Allowable Items—Con.

- proper claim against the estate as an administration expense----- 404
- 165.1.3 Source of Funds for Payment**
1. Where the restricted estate, consisting only of trust land, is awarded the devisee in the probate proceeding, the interest so received cannot be subjected to a claim for attorney's fees----- 404

EVIDENCE

225.1 Conflicting Testimony

1. The basic rule that the Examiner's findings of fact will not be disturbed where there is conflicting testimony has no application where it does not appear the decision was based upon Examiner's particular observation or evaluation of the witnesses or the statements made by them and he made no finding regarding the credibility of the witnesses... 583

225.2 Hearsay Evidence

1. Hearsay evidence is admissible as an exception to the general rule where it pertains to matters of family history, relationship and pedigree----- 583

HEARING EXAMINER

260.0 Generally

1. The rule that a Trial Examiner's findings should not be disturbed on appeal unless "clearly erroneous" is not applicable by administrative appellate tribunals, but pertains only to judicial review by the courts----- 583

INDIAN PROBATE—Continued
INDIAN REORGANIZATION ACT
OF JUNE 18, 1934 (WHEELER
HOWARD ACT)

270.0 Generally

- | | |
|--|-------------|
| 1. The Indian Reorganization Act of June 18, 1934 (48 Stat. 985, 25 U.S.C. §464) under which the tribes of the Fort Belknap Reservation placed themselves by an affirmative vote in the election held for that purpose on October 17, 1934, followed by a constitution approved December 13, 1935, and a charter ratified August 25, 1937, did not enlarge upon but rather it restricted the right of the allottees and their successors to dispose of trust property by will... | Page
450 |
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NOTICE OF HEARING

345.0 Generally

- | | |
|---|-----|
| 1. There is a presumption that persons living within the vicinity of the posting places specified in 25 CFR § 15.2 will have notice of hearing because the posting requirements of the section insure such notice is reasonably probable... | 697 |
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RECONSIDERATION

365.0 Generally

- | | |
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| 1. Reconsideration of a decision on appeal will not be granted except upon a showing of manifest error in such decision..... | 108 |
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REHEARING

370.0 Generally

- | | |
|---|--|
| 1. The requirements in 43 CFR § 4.241 that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the op- | |
|---|--|

INDIAN PROBATE—Continued
REHEARING—Continued

370.0 Generally—Continued

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| portunity to make a judgment as to whether a further hearing is warranted..... | 693 |
| 2. An order denying a rehearing is proper when the petition for rehearing alleging newly discovered evidence fails to state the alleged newly discovered evidence and fails to state any other grounds which would require a rehearing and, accordingly, an appeal from the denial will be dismissed..... | 694 |
| 3. The requirements in 43 CFR § 4.241(a) that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the opportunity to make a judgment as to whether a further hearing is warranted..... | 697 |
| 4. A rehearing was properly denied where a person who lived near a posting place on a reservation which was twice posted in five places with notice of hearing and notice of rehearing respectively, and who, by a mere allegation of lack of notice, fails to meet the burden of proof necessary to overcome the presumption of notice.... | 698 |

370.1 Pleading, Timely Filing

- | | |
|--|--|
| 1. Only the Secretary of the Interior has the authority to waive or make exceptions to the regulations | |
|--|--|

INDIAN PROBATE—Continued**REHEARING—Continued****370.1 Pleading, Timely****Filing—Continued**

setting forth time limitations for filing pleadings and, with the exception of the Board of Indian Appeals to whom he has delegated such authority, personnel of the Bureau of Indian Affairs and other employees of the Department of the Interior have no authority to waive such regulations, whether done intentionally, or inadvertently by rendering erroneous advice to a party who acts on the same to his prejudice-----

Page

108

REOPENING**375.1 Waiver of Time****Limitation**

1. An estate will not be reopened in the exercise of the Secretary's discretion to waive the time limitations where the interests remaining in the estate which could be acquired by an omitted heir are insubstantial-----
2. It is in the public interest to issue decisions which remove uncertainties or possible clouds from titles to interests in Indian allotments-----
3. No manifest injustice sufficient to justify exercise of the Secretary's discretion for the correction of an error committed 58 years ago is found where the share of which the heir or devisee was deprived is insubstantial, and the benefits to his successors would be now further reduced by fractionation of the original share-----

422

423

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INDIAN PROBATE—Continued**REOPENING—Continued****375.1 Waiver of Time****Limitation—Continued**

Page

4. When the authority granted to a Hearing Examiner in 43 CFR 4.242(a) to reopen a decided probate has expired, the Board of Indian Appeals may consider the matter under 43 CFR 4.242(h), and under the authority delegated there may exercise the Secretary's discretion to reopen, but the petition to reopen will be denied when a full consideration of the record discloses that the original decision contained no error-----

451

5. The Secretary will not exercise his discretion to waive time limitations for reopening a probate when it has been closed 32 years and there is a lack of diligence on the part of the petitioners during such period to obtain correction of an alleged mistake which they fail to attribute to fraud, accident or mistake in the original proceedings, and when they fail to allege the existence of a manifest injustice or how it might be corrected if reopening were permitted..

619

SECRETARY'S AUTHORITY**381.0 Generally**

1. The rule that a Trial Examiner's findings should not be disturbed on appeal unless "clearly erroneous" is not applicable by administrative appellate tribunals, but pertains only to judicial review by the courts----

583

INDIAN PROBATE—Continued

STATE LAW

390.0 Generally

1. Montana statutes pertaining to inheritance from illegitimates are derived from early California statutes pertaining to the same subject, and under such statutes a father of an illegitimate may not inherit from his illegitimate child unless (1) the father, after marrying the mother, has adopted the illegitimate into his own family, or (2) the father, after marrying the mother of the illegitimate, acknowledges his paternity-----

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390.2 Applicability to

Indian Probate, Testate

1. The authority of the Secretary of the Interior, under 25 U.S.C. §373, to approve the will of a deceased Indian when it disposes of trust or restricted property is not subject to state law requirements provided the will is executed in accordance with regulations approved by the Secretary-----

694

WILLS

425.0 Generally

1. The expectancy of title to minerals under an allotment created upon issuance of a trust patent under the Fort Belknap Allotment Act of March 3, 1921 (41 Stat. 1355) is trust property capable of disposition by will----

451

425.25 Revocation

1. The concept of revival of previously revoked wills is cognizable in Indian probate cases and where it

INDIAN PROBATE—Continued

WILLS—Continued

425.25 REVOCATION—Con.

Page

appears that the Indian testator intended to republish by codicil a will which had been revoked by a subsequent will, the earlier will is deemed to have been revived by the codicil and the intervening will revoked by the codicil-----

83

INVENTIONS

1. Under Department's Patent Regulations, 43 CFR 6, subpart A, section 6.5, employee-inventor retains all rights, subject to law, in an invention he made having utility in his official duties where such duties do not include devising innovations, or participation in research and development, and the Government's contribution to making the invention is insignificant-----
2. Employee invention in an intangible notation system appearing to be outside the statutory classes of invention eligible for patent protection is not an appropriate subject for a patent application to be filed at government expense in exchange for license to Government----
3. Employee-inventor's acceptance of government cash award given in consideration of his making invention would secure for the Government a right to use invention free from any further claim that might be based thereon; 5 U.S.C., sec. 2123(d) (1964)-----

3

3

3

JUDICIAL REVIEW

(See also Administrative Procedure.) Page

- 1. The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed.----- 149

MINERAL LANDS

GENERALLY

- 1. A single discovery of a valuable mineral deposit is sufficient to validate an association placer mining claim embracing 80 acres, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogeneous nature throughout the entire 80 acre claim.----- 457

DETERMINATION OF CHARACTER OF

- 1. To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and

MINERAL LANDS—Continued
DETERMINATION OF CHARACTER OF—Continued

- justify expenditure to that end; the mineral character of the land may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable.----- 44
- 2. Since geological inference may be used in establishing the mineral character of lands within a claim and such inferences can arise from proof of discovery on the claim, it is advisable not to dispose of the issue of mineral character before deciding the issue of discovery.----- 44
- 3. Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void *ab initio* for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970).----- 431A

**MINERAL LANDS—Continued
DETERMINATION OF CHAR-
ACTER OF—Continued**

4. Where (1) an association placer mining claim embracing 80 acres was located for a common variety sand and gravel prior to July 23, 1955 (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955 (3) a mineral patent has been issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter, it is error to hold such unpatented 10-acre subdivisions within the claim to be nonmineral in character and to reject a mineral patent application therefor-----
5. Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor-----

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**MINERAL LEASING ACT
APPLICABILITY**

Page

1. Where there is no determination that bentonite is a silicate of sodium or any other mineral subject to the Mineral Leasing Act, *as amended* and supplemented (30 U.S.C. secs. 181-287), bentonite will not be made subject to that statute but will continue to be subject to disposition under the statute to which it has hitherto been subject-----

642

MINING CLAIMS

(See also Multiple Mineral Development Act.)

GENERALLY

1. A deposit of gypsum, composed of particles of gypsum mixed with impurities such as clay and silica, utilized in agriculture for the gypsum it contains by applying it to alkali soils as a soil conditioner is a locatable mineral under the mining laws-----
2. Section 2322, Revised Statutes, 30 U.S.C. § 26 (1970), does not by its terms grant any right to the wife of the locator or a subsequent claimant either present or contingent in an unpatented mining claim-----
3. Common clays are not locatable under the mining laws. Only deposits of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used are subject to such location-----
4. A mining claim for a type of bentonite clay, which has not been adequately shown to be of a quality and quantity which can

43

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MINING CLAIMS—Continued**GENERALLY—Continued**

Page

be marketed profitably
for commercial purposes
for which common clays
cannot be used, is not
valid.....

589

5. A transferee of a mining
claim declared void *ab*
initio by a decision of the
Bureau of Land Manage-
ment has standing to ap-
pear before the Board of
Land Appeals in an ap-
peal proceeding from that
decision.....

599

6. Any mineral deposit subject
to location under the
Mining Law (30 U.S.C.
secs. 21-54) will continue
to be subject to dis-
position under that
statute until that statute
is amended or the deposit
is made subject to dis-
position under some other
statute. A determination
that a mineral, previously
locatable, is leasable will
not affect the validity of
claims located for that
mineral when it was
legally locatable.....

642

**COMMON VARIETIES OF MINERALS
Generally**

1. In order to satisfy the re-
quirements for discovery
of a mining claim located
for common varieties of
sand and gravel prior to
July 23, 1955, it must be
shown the materials could
have been extracted, re-
moved, and marketed at
a profit prior to that date.
Where a mining claimant
fails to prove by a pre-
ponderance of the evi-
dence that the materials
from his claim could have
been extracted, removed,
and marketed at a profit
prior to that date, the

MINING CLAIMS—Continued**COMMON VARIETIES OF MIN-
ERALS—Continued****Generally—Continued**

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claim is properly declared
null and void for the
lack of a timely discovery
of a valuable mineral
deposit.....

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2. A deposit of gypsite, com-
posed of particles of gyp-
sum mixed with impuri-
ties such as clay and
silica, utilized in agri-
culture for the gypsum it
contains by applying it
to alkali soils as a soil
conditioner is a locatable
mineral under the mining
laws.....

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3. Dolomite which can only be
used as aggregate in road
construction, ground cov-
er, leach lines and other
purposes for which com-
mon varieties of sand,
stone and gravel may be
used must be considered
a common variety under
section 3 of the Act of
July 23, 1955, unless it
can be shown to have a
unique property giving it
a special and distinct
value as reflected by a
substantially higher com-
mercial value for the
dolomite than other ma-
terials used for the same
purposes.....

379

4. Although a deposit of dolo-
mite may be considered
an uncommon variety
within section 3 of the
Act of July 23, 1955, if
suitable for metallurgical
use, the prudent man test
of *Castle v. Womble*, as
complemented by the
“marketability at a prof-
it” test, must be satisfied
to sustain a placer mining
claim for the deposit....

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MINING CLAIMS—Continued
COMMON VARIETIES OF MIN-
ERALS—Continued

Generally—Continued

5. If a deposit of dolomite is locatable under the mining laws only because it can be used for metallurgical and other uses for which common varieties of sand, stone, gravel, etc. cannot be used and has no property giving it a special and distinct value otherwise, the sales of the dolomite for purposes for which common varieties of materials can be used cannot be considered to establish the marketability at a profit and value of the deposit for the metallurgical and other uncommon variety uses...

Page

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6. Where (1) an association placer mining claim embracing 80 acres was located for a common variety sand and gravel prior to July 23, 1955 (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955 (3) a mineral patent has been issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter, it is error to hold such unpatented 10-acre subdivisions within the claim to be non-

MINING CLAIMS—Continued
COMMON VARIETIES OF MIN-
ERALS—Continued

Generally—Continued

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- mineral in character and to reject a mineral patent application therefor..... 457
7. Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor..... 457
8. Common clays are not locatable under the mining laws. Only deposits of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used are subject to such location..... 588
9. A mining claim for a type of bentonite clay, which has not been adequately shown to be of a quality and quantity which can be marketed profitably for commercial purposes for which common clays cannot be used, is not valid.. 589
10. The Board will uphold the conclusion of an Administrative Law Judge that where a placer mining claim, located after July 23, 1955, contains common varieties of sand, gravel, and clay and also deposits of metalliferous minerals including gold,

MINING CLAIMS—Continued
COMMON VARIETIES OF MIN-
ERALS—Continued

Generally—Continued

Page

silver, and mercury, the locatable minerals must support a discovery without consideration of the economic value of non-locatable deposits..... 689

11. Since Congress withdrew common varieties of sand and gravel from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior thereto to show that all the requirements for a discovery—including that the materials could have been extracted, removed, and marketed at a profit—had been met by that date..... 689

12. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date..... 709

Special Value

1. Dolomite which can only be used as aggregate in road construction, ground cover, leach lines and other purposes for which common varieties of sand, stone and gravel may be used must be considered a common variety under

MINING CLAIMS—Continued
COMMON VARIETIES OF MIN-
ERALS—Continued

Special Value—Continued

Page

section 3 of the Act of July 23, 1955, unless it can be shown to have a unique property giving it a special and distinct value as reflected by a substantially higher commercial value for the dolomite than other materials used for the same purposes..... 379

Unique Property

1. The fact that a deposit of otherwise common sand and gravel may be located in an area where assertedly sand and gravel is scarce does not make it an "uncommon variety," since scarcity is not a unique property inherent in the deposit but is only an extrinsic factor..... 27

2. A deposit of sand and gravel, without a unique property which gives it a special value, cannot be determined to be an uncommon variety solely on the basis of its location, even though the location gives the deposit an economic advantage due to its proximity to market... 689

CONTESTS

1. To establish a *prima facie* case and to meet its burden of proof, in a mining contest, the government is not required to negate all the proofs of discovery. The government can meet its burden by competent testimony that there has been no discovery of a valuable mineral deposit..... 43

MINING CLAIMS—Continued
CONTESTS—Continued

2. Where the Government mineral examiner conducted his examination of contested claims under a misapprehension that the mineral deposit on the claims was not locatable, the case will be remanded so that a proper examination of the claims may be made.....

44

3. If upon review of the record of contest proceedings it is evident that stipulations of fact by the parties to the proceeding are insufficient to support the finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, a hearing will be ordered to receive and develop additional evidence on the issues in the contest complaint.....

118

4. The Secretary of the Interior may inquire into all matters vital to the validity of mining claims at any time before the passage of legal title, and, where it is evident upon review of the record of contest proceedings that stipulations of fact by the parties are insufficient to support a finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, may order a hearing to receive and develop additional evidence on the issues in the contest complaint.....

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MINING CLAIMS—Continued
CONTESTS—Continued

Page

5. When parties to a mining contest request that the contest be determined solely on the basis of stipulated facts, the stipulated facts must be read as a whole and each fact interpreted with reference to the whole, and any final determination must be based upon the preponderance of the evidence.....

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6. Under the Department rules governing government contests against mining claims, a contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and where he fails timely to file an answer to the allegations of the complaint, they will be taken as admitted and the mining claim which is subject of the contest is properly declared null and void without a hearing where one of the charges in the complaint alleges no discovery of a valuable mineral deposit.....

155

7. In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is being met by more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes.....

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MINING CLAIMS—Continued
CONTESTS—Continued

Page

8. A mining claim for dolomite is properly declared null and void where it is concluded that there was not a sufficient market for metallurgical and other uncommon variety uses for the dolomite to justify the costs of mining the claim solely for such uses..... 380
9. A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some prehearing newspaper publicity that the contest was being instituted but the claimant does not show that there was any unfairness in the contest proceeding itself..... 588
10. A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's *prima facie* case of no discovery with a preponderance of the evidence..... 588
11. A statement made in a Bureau appeal decision which does not accurately reflect one evidentiary fact does not establish that the decision's other findings were erroneous, and this Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that conclusion..... 589

MINING CLAIMS—Continued
CONTESTS—Continued

Page

12. The Government may initiate a contest to determine the validity of mining claims. Its delay in bringing a contest after a mineral patent application has been filed cannot serve as a substitute for a discovery by the applicant necessary to validate a claim, nor does the applicant's holding the claims for many years prior to the filing of the application obviate the necessity of evidence of a discovery..... 682
13. Failure of a mineral examiner to notify a claimant of a field examination is not a sufficient reason in a subsequent contest against mining claims to disqualify the Government's evidence of the examination and sampling, especially where the field examination was of sites previously identified in joint examinations conducted with the claimant..... 682
14. Appellant's request for an opportunity to obtain new evidence for a further hearing in a mining claim contest will be denied where there has been no tender of proof which would tend to establish a valid discovery..... 690
15. Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to exam-

MINING CLAIMS—Continued
CONTESTS—Continued

- | | |
|--|-------------|
| ine the discovery points made available by a claimant and to verify, if possible, the claimed discovery. | Page
709 |
|--|-------------|
- DETERMINATION OF VALIDITY**
1. To establish a *prima facie* case and to meet its burden of proof, in a mining contest, the government is not required to negate all the proofs of discovery. The government can meet its burden by competent testimony that there has been no discovery of a valuable mineral deposit. 43
 2. Where a mineral claimant has located a group of claims he must show a discovery on each claim, which requires a showing that the mineral from each claim could have been extracted, removed and marketed at a profit. 43
 3. If it is shown as to a number of claims located for gypsite, and for which applications for patent have been filed, that the amount of deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid from which production would most feasibly meet the market demand and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery. 44
 4. If upon review of the record of contest proceedings it is evident that stipulations of fact by the parties to the proceeding are insufficient to support the finding previously made that the mining claimants

MINING CLAIMS—Continued
DETERMINATION OF VALIDITY—Continued

- | | |
|--|-------------|
| have satisfied the requirements of the mining laws and are entitled to a patent for the claims, a hearing will be ordered to receive and develop additional evidence on the issues in the contest complaint. | Page
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|--|-------------|
5. The Secretary of the Interior may inquire into all matter vital to the validity of mining claims at any time before the passage of legal title, and, where it is evident upon review of the record of contest proceedings that stipulations of fact by the parties are insufficient to support a finding previously made that the mining claimants have satisfied the requirements of the mining laws and are entitled to a patent for the claims, may order a hearing to receive and develop additional evidence on the issues in the contest complaint. 118
 6. Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character

MINING CLAIMS—Continued
DETERMINATION OF VALIDITY—Continued

of the land at the time his claims were located before the claims can be declared void *ab initio* for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970)----- Page 431A

7. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), does not obviate the necessity of a mining claimant to show a valid discovery in order to be entitled to a patent for a mining claim. 431A

8. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States----- 431A

DISCOVERY

Generally

1. To prove that a discovery of a valuable mineral de-

MINING CLAIMS—Continued
DISCOVERY—Continued
Generally—Continued

posit has been made under the mining laws it is not necessary to show there is an actual profitable mining operation in existence; instead there must be evidence of the quantity and quality of the mineral deposit within the claim which under known marketing conditions could be sold at a price which would justify reasonably expected costs of a mining operation so that a prudent man would expect to develop a valuable mine----- Page 44

2. A mining claim for dolomite is properly declared null and void where it is concluded that there was not a sufficient market for metallurgical and other uncommon variety uses for the dolomite to justify the costs of mining the claim solely for such uses. 380

3. A single discovery of a valuable mineral deposit is sufficient to validate an association placer mining claim embracing 80 acres, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogeneous nature throughout the entire 80 acre claim----- 457

4. A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's *prima facie* case of no discovery with

MINING CLAIMS—Continued

DISCOVERY—Continued

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| a preponderance of the evidence..... | 588 |
| 5. Common clays are not locatable under the mining laws. Only deposits of clay of an exceptional nature which can be marketed for uses for which ordinary clays cannot be used are subject to such location..... | 588 |
| 6. A mining claim for a type of bentonite clay, which has not been adequately shown to be of a quality and quantity which can be marketed profitably for commercial purposes for which common clays cannot be used, is not valid..... | 589 |
| 7. Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit..... | 589 |
| 8. The Government may initiate a contest to determine the validity of mining claims. Its delay in bringing a contest after a mineral patent application has been filed cannot serve as a substitute for a discovery by the applicant necessary to validate a claim, nor does the applicant's holding the claims for many years prior to the filing of the application obviate the necessity of evidence of a discovery..... | 682 |
| 9. The requirement of a discovery of a valuable mineral deposit is not met by | |

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| geological inference, the "intrinsic value" of the minerals sampled, proximity to patented claims, or delay in contesting the claims; instead, there must be a showing of sufficient mineral so that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine..... | 682 |
| 10. To verify whether a discovery of a valuable mineral deposit has been made, Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant; they do not do the discovery work for the claimant and do not need to drill to prove or disprove the existence of minerals at depth where the claimant has not done so..... | 683 |
| 11. Inability of a mining claimant to make the necessary capital investment to establish the existence of a discovery of a valuable mineral deposit is not an excuse or substitute for failure of the claimant to prove the existence of the deposit in order to be entitled to a patent for a mining claim..... | 683 |
| 12. The Board will uphold the conclusion of an Administrative Law Judge that where a placer mining claim, located after July 23, 1955, contains common varieties of sand, gravel, and clay and also | |

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Geologic Inference—Con.

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deposits of metalliferous minerals including gold, silver, and mercury, the locatable minerals must support a discovery without consideration of the economic value of non-locatable deposits.....

689

13. A clay deposit is not locatable under the mining laws, though sold for use as an additive in cattle feed, where it is not shown that the clay possesses characteristics which give it an unusual value distinguishing it from common clays.....

689

14. Government mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.....

709

Geologic Inference

1. The requirement of a discovery of a valuable mineral deposit is not met by geological inference, the "intrinsic value" of the minerals sampled, proximity to patented claims, or delay in contesting the claims; instead, there must be a showing of sufficient mineral so that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success,

MINING CLAIMS—Continued
DISCOVERY—Continued
Geologic Inference—Con.

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in developing a valuable mine.....

682

Marketability

1. The Government may raise a presumption that the material on the claim could not be extracted and marketed at a profit by introducing evidence that claimant has done nothing toward the development of the claim..

27

2. In order to satisfy the requirements for discovery of a mining claim located for common varieties of sand and gravel prior to July 23, 1955, it must be shown the materials could have been extracted, removed, and marketed at a profit prior to that date. Where a mining claimant fails to prove by a preponderance of the evidence that the materials from his claim could have been extracted, removed, and marketed at a profit prior to that date, the claim is properly declared null and void for the lack of a timely discovery of a valuable mineral deposit..

28

3. The holding of a mining claim as a reserve for a prospective market does not impart validity to the claim.....

28

4. If it is shown as to a number of claims located for gypsite, and for which applications for patent have been filed, that the amount of deposits on the claims is excessively large in relation to the market that exists, only

MINING CLAIMS—Continued

DISCOVERY—Continued

Marketability—Continued

Page

those claims can be found valid from which production would most feasibly meet the market demand and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery-----

44

5. Although a deposit of dolomite may be considered an uncommon variety within section 3 of the Act of July 23, 1955, if suitable for metallurgical use, the prudent man test of *Castle v. Womble*, as complemented by the "marketability at a profit" test, must be satisfied to sustain a placer mining claim for the deposit----

379

6. If a deposit of dolomite is locatable under the mining laws only because it can be used for metallurgical and other uses for which common varieties of sand, stone, gravel, etc. cannot be used and has no property giving it a special and distinct value otherwise, the sales of the dolomite for purposes for which common varieties of materials can be used cannot be considered to establish the marketability at a profit and value of the deposit for the metallurgical and other uncommon variety uses-----

379

7. In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is being met by

MINING CLAIMS—Continued

DISCOVERY—Continued

Marketability—Continued

Page

more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes--

379

8. The marketability test, as developed by this Department and approved by the courts, is a complement to the prudent man test of discovery of a valuable mineral deposit under the mining laws, and publication of the test in the *Federal Register* is not a prerequisite to its validity-----

588

9. The marketability test of discovery of a valuable mineral deposit under the mining laws does not violate due process of law as being unconstitutionally vague, or as being unlawful administrative legislation-----

588

10. The marketability test of discovery is not satisfied by speculation that there might be a market at some future date-----

589

11. Since Congress withdrew common varieties of sand and gravel from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior thereto to show that all the requirements for a discovery—including that the materials could have been extracted, removed, and marketed at a profit—had been met by that date-----

689

MINING CLAIMS—Continued	
DISCOVERY—Continued	
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12. The fact that nothing is done toward the development of a mining claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them.....	689
13. The holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim.....	689
14. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date.....	709
15. The Government may raise a presumption that the material on mining claims could not be extracted and marketed at a profit by introducing evidence that the claimant has done nothing to develop the claim.....	709
HEARINGS	
1. A stipulation by a field solicitor at a hearing that the statutory requisites for the grant of a patent have been met does not preclude consideration in a	

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further proceeding of any question vital to the determination of whether the requirements of the law have been met.....	43
2. Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, <i>as amended</i> , 30 U.S.C. §181 <i>et seq.</i> (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void <i>ab initio</i> for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. §521 (1970).....	431A
3. Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after an initial decision in a mining contest may not be considered or relied upon in making a final decision, but may only be considered to determine if	

MINING CLAIMS—Continued

HEARINGS—Continued

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there should be a further hearing-----

589

4. In a Departmental proceeding to determine the validity of a mining claim, an evidentiary hearing under the Administrative Procedure Act is required only if there is a disputed determinative question of fact; where the validity of a claim turns on the legal effect to be given to facts of record determining the status of the land when the claim was located no hearing is required....

599

5. Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ab initio* without a hearing..

600

6. Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the evidence was presented. The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports

MINING CLAIMS—Continued

HEARINGS—Continued

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and information on the claims-----

682

LANDS SUBJECT TO

1. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States-----

431A

2. Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ab initio* without a hearing..

600

3. Notice on public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and

MINING CLAIMS—Continued**LANDS SUBJECT TO—Continued**

- the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws.... 600
4. A failure of Government officials to provide information that land was closed to mining locations cannot give life to invalid mining claims..... 600

MINERAL LANDS

1. To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character of the land may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable.... 44
2. Since geological inference may be used in establishing the mineral character of lands within a claim and such inferences can arise from proof of discovery on the claim, it is advisable not to dispose of the issue of mineral character before deciding the issue of discovery..... 44

PATENT

1. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), does not obviate the necessity of a mining claimant to show a valid discovery in order to be entitled to a patent for a mining claim..... 431A

MINING CLAIMS—Continued**PATENT—Continued**

2. Where (1) an association placer mining claim embracing 80 acres was located for a common variety sand and gravel prior to July 23, 1955 (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955 (3) a mineral patent has been issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter, it is error to hold such unpatented 10-acre subdivisions within the claim to be nonmineral in character and to reject a mineral patent application therefor..... 457
3. Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor..... 457

MINING CLAIMS—Continued

PATENT—Continued

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4. Inability of a mining claimant to make the necessary capital investment to establish the existence of a discovery of a valuable mineral deposit is not an excuse or substitute for failure of the claimant to prove the existence of the deposit in order to be entitled to a patent for a mining claim-----

683

PLACER CLAIMS

1. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim, by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, could have been extracted, removed, and marketed at a profit as of that date-----

709

RELOCATION

1. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then

MINING CLAIMS—Continued

RELOCATION—Continued

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shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States-----

431A

MINING CLAIMS RIGHTS RESTORATION ACT

1. Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ab initio* without a hearing--

600

2. Notice on public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws-----

600

MULTIPLE MINERAL DEVELOPMENT ACT

GENERALLY

1. Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry

MULTIPLE MINERAL DEVELOPMENT ACT—Continued
GENERALLY—Continued

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under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States-----

431A

HEARINGS

1. Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void *ab initio* for his failure to file amended locations as required to take advantage of the benefits of section 1 of the Multiple Mineral De-

MULTIPLE MINERAL DEVELOPMENT ACT—Continued
HEARINGS—Continued

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velopment Act of August 13, 1954, 30 U.S.C. § 521 (1970)-----

431A

NOTICE

1. Notice on public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws----- 600
2. A failure of Government officials to provide information that land was closed to mining locations cannot give life to invalid mining claims-- 600
3. Failure of a mineral examiner to notify a claimant of a field examination is not a sufficient reason in a subsequent contest against mining claims to disqualify the Government's evidence of the examination and sampling, especially where the field examination was of sites previously identified in joint examinations conducted with the claimant. 682

OIL AND GAS LEASES

GENERALLY

1. Although statute requires the consent of the agency administering the surface of *acquired* federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to

OIL AND GAS LEASES—Continued
GENERALLY—Continued

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the issuance of the lease, where an oil and gas lease offer is made for available *public* lands which have been withdrawn, the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest.....

416

2. Where a water users' association was—under a 1940 contract between the United States and the association transferring care, operation, and maintenance of a reclamation project to the association—entitled to make, subject to the approval of the Secretary of the Interior, oil and gas leases on lands specially acquired for the project and to be credited with the revenues therefrom in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501), Congress did not intend, in enacting the Mineral Leasing Act for Acquired Lands of August 7, 1947 (30 U.S.C. 351), to take such

OIL AND GAS LEASES—Continued
GENERALLY—Continued

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rights away from the association.....

513

ACQUIRED LANDS LEASES

1. Although statute requires the consent of the agency administering the surface of *acquired* federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to the issuance of the lease, where an oil and gas lease offer is made for available *public* lands which have been withdrawn, the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest.....
2. Where a water users' association was—under a 1940 contract between the United States and the association transferring care, operation, and maintenance of a reclamation project to the association—entitled to make, subject to the approval of the Secretary of the Interior, oil and gas leases on lands specially acquired

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OIL AND GAS LEASES—Continued **ACQUIRED LANDS LEASES—Con.**

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for the project and to be credited with the revenues therefrom in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501), Congress did not intend, in enacting the Mineral Leasing Act for Acquired Lands of August 7, 1947 (30 U.S.C. 351), to take such rights away from the association.....

513

APPLICATIONS

Generally

1. Although statute requires the consent of the agency administering the surface of *acquired* federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to the issuance of the lease, where an oil and gas lease offer is made for available *public* lands which have been withdrawn, the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest.....

416

OIL AND GAS LEASES—Continued **CANCELLATION**

Page

1. Where land included in an existing oil and gas lease is known to contain valuable deposits of oil and gas, the lease may not be canceled administratively by the Department but may be canceled only by judicial proceedings. 30 U.S.C. § 184 (1970); 43 CFR 3108.3.....

440

2. *Dictum*: With regard to cancellation of an oil or gas lease, the terms "known geologic structure" and "known to contain valuable deposits of oil or gas" could be distinguished on the basis that the presumptive productivity referred to in the definition of known geologic structure may be a matter of expert opinion, whereas the words "known to contain valuable deposits" connote matters of actual fact. 43 CFR 3100.0-5 and 3108.3.....

440

COMPETITIVE LEASES

1. A decision rejecting a bid for an Outer Continental Shelf Lands Act oil and gas lease will be set aside where the bid met two of three criteria used by the manager to evaluate bids, and the third one was improperly imposed.....

597

CONSENT OF AGENCY

1. Although statute requires the consent of the agency administering the surface of *acquired* federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to the issuance of the lease, where an oil

**OIL AND GAS LEASES—Continued
CONSENT OF AGENCY—Con.**

and gas lease offer is made for available *public* lands which have been withdrawn, the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest... 416

DRILLING

1. Actual drilling operations on an oil and gas lease, commenced during or after a period when a lease exists only by reason of its commitment to a productive unit, are not a sufficient basis for invoking the two-year extension under 30 U.S.C. § 226-1(d) (1970)----- 533

EXTENSIONS

1. An oil and gas lease which has been extended and has vitality only by reason of its inclusion in a producing unit is not within its "primary term" within the ambit of 30 U.S.C. § 226-1(d) (1970)--- 533
2. "Primary term" in that context includes all definite and finite periods of extension fixed by law. It does not include any period of time whose termination depends upon

**OIL AND GAS LEASES—Continued
EXTENSIONS—Continued**

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the occurrence or non-occurrence of a contingency, *e.g.*, the cessation or continuation of production----- 533

3. Actual drilling operations on an oil and gas lease, commenced during or after a period when a lease exists only by reason of its commitment to a productive unit, are not a sufficient basis for invoking the two-year extension under 30 U.S.C. § 226-1(d) (1970)----- 533

KNOWN GEOLOGIC STRUCTURE

1. Notice given in 1967 that an oil and gas lease is subject to increased rental because of inclusion of some of its lands in a known geologic structure of a producing oil or gas field is considered to be adequate notice that a lease segregated therefrom in 1970, containing some lands on such known geologic structure, is also subject to payment of the increased rental----- 17
2. *Dictum*: With regard to cancellation of an oil or gas lease, the terms "known geologic structure" and "known to contain valuable deposits of oil or gas" could be distinguished on the basis that the presumptive productivity referred to in the definition of known geologic structure may be a matter of expert opinion, whereas the words "known to contain valuable deposits" connote matters of actual fact. 43 CFR 3100.0-5 and 3108.3----- 440

OIL AND GAS LEASES—Continued**LANDS SUBJECT TO**

1. Where an application for a preference right oil and gas lease is filed for land included in an outstanding oil and gas lease of record, the application must be rejected because the land is segregated by that lease—whether the outstanding lease is valid, void or voidable----- 440

PREFERENCE RIGHT LEASES

1. Where an application for a preference right oil and gas lease is filed for land included in an outstanding oil and gas lease of record, the application must be rejected because the land is segregated by that lease—whether the outstanding lease is valid, void or voidable----- 440

RENTALS

1. Where a producing oil and gas lease is partially committed to a unit agreement and the segregated uncommitted lands do not contain a well capable of producing oil or gas in paying quantities, the segregated lease is subject to payment of annual rental on or before the anniversary date of the lease. Where the lessee is not informed of approval of the unit agreement and segregation of the uncommitted lands into a new lease effective April 1, 1970, and he did not receive notice until some five weeks thereafter of such actions and subsequent to anniversary date of the lease, May 1, 1970, the segregated lease is not automatically terminated un-

OIL AND GAS LEASES—Continued
RENTALS—Continued

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- der 30 U.S.C. § 188 (1970) for failure to pay the annual rental on or before the anniversary date of the lease----- 17
2. Notice given in 1967 that an oil and gas lease is subject to increased rental because of inclusion of some of its lands in a known geologic structure of a producing oil or gas field is considered to be adequate notice that a lease segregated therefrom in 1970, containing some lands on such known geologic structure, is also subject to payment of the increased rental--- 17
3. Congress intended that the automatic termination provision of 30 U.S.C. § 188 (1970) apply to the regular, annual rental payment, the necessity for which a lessee had continuous notice and that provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued----- 18
4. The failure to pay annual rental on or before the anniversary date for an oil and gas lease, segregated from a producing lease because of partial commitment to an approved unit agreement effective at 7 a.m. on that anniversary date, does not cause the segregated lease to terminate by operation of law under 30 U.S.C. § 188 (1970)--- 21
5. Congress intended that the automatic termination provision of 30 U.S.C.

OIL AND GAS LEASES—Continued
RENTALS—Continued

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- § 188 (1970) apply to the regular annual rental payment the necessity for which a lessee had continuous notice. That provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued-----
- 21
6. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit, the leased lands are situated in whole or in part on the known geologic structure of a producing oil or gas field, and the lease terms and factual circumstances are identical to those in the decision, *Standard Oil Company of California et. al.* 76 I.D. 271 (1969), this Department will follow the ruling by the United States Court of Appeals for the Ninth Circuit in *Standard Oil Company of California v. Morton*, 450 F. 2d 493 (1971), which overturned that decision solely upon principles of contract construction; therefore, the eliminated lands will retain the rental rate applicable to non-participating acreage within the unit rather than the higher rate applicable to non-unitized lands within a known geologic structure-----

TERMINATION

1. Congress intended that the automatic termination provision of 30 U.S.C. § 188 (1970) apply to the regular, annual rental payment, the necessity

OIL AND GAS LEASES—Continued
TERMINATION—Continued

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- for which a lessee had continuous notice and that provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued-----
- 18
2. Congress intended that the automatic termination provision of 30 U.S.C. § 188 (1970) apply to the regular annual rental payment, the necessity for which a lessee had continuous notice. That provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued-----
- 21

UNIT AND COOPERATIVE AGREEMENTS

1. Where only a portion of the lands in a unitized oil and gas lease is eliminated from the unit, the leased lands are situated in whole or in part on the known geologic structure of a producing oil or gas field, and the lease terms and factual circumstances are identical to those in the decision, *Standard Oil Company of California et. al.*, 76 I.D. 271 (1969), this Department will follow the ruling by the United States Court of Appeals for the Ninth Circuit in *Standard Oil Company of California v. Morton*, 450 F.2d 493 (1971), which overturned that decision solely upon principles of contract construction; therefore, the eliminated lands will retain the rental rate applicable to nonparticipat-

OIL AND GAS LEASES—Continued
UNIT AND COOPERATIVE
AGREEMENTS—Continued

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ing acreage within the unit rather than the higher rate applicable to non-unitized lands within a known geologic structure.

23

2. Actual drilling operations on an oil and gas lease, commenced during or after a period when a lease exists only by reason of its commitment to a productive unit, are not a sufficient basis for invoking the two-year extension under 30 U.S.C. § 226-1(d) (1970)-----

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OUTER CONTINENTAL SHELF LANDS
ACT

(See also Oil and Gas Leases.)

OIL AND GAS LEASES

1. The competitive bidding requirement in the Outer Continental Shelf Lands Act for awarding oil and gas or sulfur leases is satisfied by due advertisement and a giving of an opportunity to bid, and contemplates that all bidders be placed upon the same plane of equality, and that they each bid upon the same terms and conditions set forth in the advertisements, and the pertinent statutes and in the Department's regulations. Competitive bidding does not require that more than one bid be submitted before the authorized officer, but only that the officer, by due advertisement, give opportunity for everyone to bid-----

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2. A decision rejecting a bid for an Outer Continental Shelf Lands Act oil and gas lease will be set aside

OUTER CONTINENTAL SHELF
LANDS ACT—Continued

OIL AND GAS LEASES—Con.

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where the bid met two of three criteria used by the manager to evaluate bids, and the third one was improperly imposed-----

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PATENTS OF PUBLIC LANDS

GENERALLY

1. Generally, when public lands are patented all title and control of the land passes from the United States and this Department has no authority to issue rights-of-way over the patented lands-----
2. In determining what land is conveyed under patents or grants of public land bordering on a meandered body of water, the general rule is that the waterline itself, not the meander line, constitutes the boundary except where there is fraud or gross error shown in the survey of the lines or where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines----

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RESERVATIONS

1. Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Commission had granted a license for a transmission line are subject to the reservation prescribed by section 24 of the Federal Power Act regardless of whether or not the reservation was stated in the patent-----
2. Where lands are patented subject only to a reservation under section 24 of the Federal Power Act,

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PATENTS OF PUBLIC LANDS—
Continued

RESERVATIONS—Continued

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the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority-----

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3. *Quaere*: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way under the Act of March 4, 1911, over the patented lands-----

67

4. Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed under a different act, a reservation of the right will not be presumed-----

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POWER

DEVELOPMENT AND SALE

1. Where a contract between the United States and a water users' association transfers care, operation, and maintenance of a reclamation project to the association and gives it a qualified interest in revenues earned from the operation of project power plants and the leasing of project grazing and farm lands, the association would be entitled to be made whole if use of such

POWER—Continued

DEVELOPMENT AND SALES—
Continued

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lands by the United States for a non-project purpose causes the association to lose revenues that are being credited to it pursuant to the contract-----

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2. Revenues earned by a water users' association from the operation of project power plants and the leasing of project grazing and farm lands cannot be distributed to individual water users either before or after project repayment but must be applied to project purposes, where the United States has transferred the care, operation, and maintenance of a reclamation project to the association under a contract which provides that such revenues are to be credited in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501)-----

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TRANSMISSION LINES

1. Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Commission had granted a license for a transmission line are subject to the reservation prescribed by section 24 of the Federal Power Act regardless of whether or not the reservation was stated in the patent-----
2. Where lands are patented subject only to a reservation under section 24 of the Federal Power Act, the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-

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way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority----- 67

3. The Department of the Interior has authority under the Act of March 4, 1911, to grant rights-of-way over public lands for hydroelectric transmission lines which are not primary lines under the jurisdiction of the Federal Power Commission----- 67

4. *Quære*: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way under the Act of March 4, 1911, over the patented lands----- 67

5. Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed under a different Act, a reservation of the right will not be presumed----- 67

PUBLIC LANDS

(See also Boundaries, Surveys of Public Lands.)

RIPARIAN RIGHTS

1. In determining what land is conveyed under patents or grants of public land bordering on a meandered body of water, the general rule is, that the waterline itself, not the meander

PUBLIC LANDS—Continued**RIPARIAN RIGHTS—Continued Page**

line, constitutes the boundary except where there is fraud or gross error shown in the survey of the lines or where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines----- 397

DISPOSALS OF**Generally**

1. Private agreements do not control the disposition of federal public land. Rights to federal lands must be gained by compliance with the governing federal public land laws... 637

PUBLIC RECORDS

(See also Administrative Procedure.)

1. A homestead application must be rejected when filed at a time when the Master Title Plat in the local Bureau of Land Management office shows *prima facie* that the lands are embraced in a state selection application and the serial register sheet, referred to on the plat, shows that tentative approval has been given to the state selection for those lands----- 391
2. Notice on public land status records in the local Bureau of Land Management office of the issuance of a preliminary permit by the Federal Power Commission, and the filing of the application for the permit and the application for a license with the Commission, is not essential to segregate the lands from location under the mining laws----- 600

RECLAMATION LANDS

GENERALLY

1. Where a contract between the United States and a water users' association transfers care, operation, and maintenance of a reclamation project to the association and gives it a qualified interest in revenues earned from the operation of project power plants and the leasing of project grazing and farm lands, the association would be entitled to be made whole if use of such lands by the United States for a non-project purpose causes the association to lose revenues that are being credited to it pursuant to the contract-----

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2. Revenues earned by a water users' association from the operation of project power plants and the leasing of project grazing and farm lands cannot be distributed to individual water users either before or after project repayment but must be applied to project purposes, where the United States has transferred the care, operation, and maintenance of a reclamation project to the association under a contract which provides that such revenues are to be credited in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501)-----

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ACQUISITION AND DISPOSAL

1. Where title to lands in a reclamation project is in the United States, such lands or any fixtures thereon cannot be sold or

RECLAMATION LANDS—Con.

ACQUISITION AND DISPOSAL—Continued

mortgaged, either before or after project repayment, except as authorized by Congress-----

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513

LEASES

1. Where a contract between the United States and a water users' association transfers care, operation, and maintenance of a reclamation project to the association and gives it a qualified interest in revenues earned from the operation of project power plants and the leasing of project grazing and farm lands, the association would be entitled to be made whole if use of such lands by the United States for a non-project purpose causes the association to lose revenues that are being credited to it pursuant to the contract-----

513

2. Revenues earned by a water users' association from the operation of project power plants and the leasing of project grazing and farm lands cannot be distributed to individual water users either before or after project repayment but must be applied to project purposes, where the United States has transferred the care, operation, and maintenance of a reclamation project to the association under a contract which provides that such revenues are to be credited in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501)-----

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RECLAMATION LANDS—Con. LEASES—Continued

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3. Where a water users' association was—under a 1940 contract between the United States and the association transferring care, operation, and maintenance of a reclamation project to the association—entitled to make, subject to the approval of the Secretary of the Interior, oil and gas leases on lands specially acquired for the project and to be credited with the revenues therefrom in conformity with subsection 1 of section 4 of the Act of December 5, 1924 (43 U.S.C. § 501), Congress did not intend, in enacting the Mineral Leasing Act for Acquired Lands of August 7, 1947 (30 U.S.C. § 351), to take such rights away from the association.....

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REGULATIONS

(See Also *Administrative Procedure.*)

GENERALLY

1. The Secretary of the Interior is authorized under sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. § 615(a) (1970) [formerly 48 U.S.C. § 421 (1958)], to promulgate regulations governing small sales of timber in Alaska which provide for competitive bidding. However, where regulations specifically provide for exclusively noncompetitive procedures for such sales, the general timber regulations, based upon 30 U.S.C. § 601 (1970) will be deemed not applicable.....

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1. The Secretary of the Interior is authorized under sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. § 615(a) (1970) [formerly 48 U.S.C. § 421 (1958)], to promulgate regulations governing small sales of timber in Alaska which provide for competitive bidding. However, where regulations specifically provide for exclusively noncompetitive procedures for such sales, the general timber regulations, based upon 30 U.S.C. § 601 (1970) will be deemed not applicable.....

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RES JUDICATA

1. Where an appeal has been taken and a final Departmental decision has been rendered thereon, the principle of *res judicata* will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim, and the same issues.....

149

RIGHTS-OF-WAY

(See also *Outer Continental Shelf Lands Act.*)

GENERALLY

1. Generally, when public lands are patented all title and control of the land passes from the United States and this Department has no authority to issue rights-of-way over the patented lands.....
2. Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Com-

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RIGHTS-OF-WAY—Continued**GENERALLY—Continued**

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- mission had granted a license for a transmission line are subject to the reservation prescribed by section 24 of the Federal Power Act regardless of whether or not the reservation was stated in the patent----- 67
3. Where lands are patented subject only to a reservation under section 24 of the Federal Power Act, the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority----- 67
4. *Quaere*: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way under the Act of March 4, 1911, over the patented lands----- 67
5. Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed under a different Act, a reservation of the right will not be presumed----- 67

RIGHTS-OF-WAY—Continued**ACT OF MARCH 4, 1911**

1. Where lands are patented subject only to a reservation under section 24 of the Federal Power Act, the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority----- 67
2. The Department of the Interior has authority under the Act of March 4, 1911, to grant rights-of-way over public lands for hydroelectric transmission lines which are not primary lines under the jurisdiction of the Federal Power Commission----- 67
3. *Quaere*: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way under the Act of March 4, 1911, over the patented lands----- 67
4. Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed

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under a different Act, a reservation of the right will not be presumed----	67

RULES OF PRACTICE

(See also Appeals, Contests
and Protests, Contracts, Fed-
eral Coal Mine Health and
Safety Act of 1969, Hearings,
Indian Probate.)

GENERALLY

1. Where the Secretary assumed jurisdiction of a mining claim contest by directing that the Hearing Examiner forward a recommended decision directly to the Department level, the Secretary was not bound by such directive to decide the case and it was not a violation of due process to return the case to the Director of the Bureau of Land Management to render the initial decision under the then prevailing adjudicative procedure----- 28

APPEALS**Generally**

1. Where an appeal has been taken and a final Departmental decision has been rendered thereon, the principle of *res judicata* will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim, and the same issues.----- 149
2. In the absence of a Board rule requiring that the Board member who presided at the hearing of an appeal prepare or par-

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ticipate in the decision, the failure of the Board to assign the preparation of an opinion to a retired, former member who conducted the hearing is not a violation of a contractor's constitutional rights, even where credibility and the demeanor of witnesses are in issue, since procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the members of the Board rendering the decision----- 158

3. Where in the course of an extended hearing of an appeal by a contractor under a contract for the construction of a dam and related work, substantial testimony was taken, accompanied by the introduction of numerous exhibits, without objection by the Government, in connection with certain claims relating to allegedly harsh and unworkable concrete ordered by the Government, only some of which were expressly considered by the contracting officer in his various findings of fact, a remand of unconsidered claims to the contracting officer for additional findings is not required.----- 161

RULES OF PRACTICE—Continued
APPEALS—Continued

Generally—Continued

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| 4. A contractor in an appeal having a massive record, who alleges instances of inadequate payment under a contract for the construction of a dam, and in support thereof introduces into evidence various Government payment books unpaginated and some seven inches in thickness without clearly establishing such allegations by further specification or identification in such books, has not sustained its burden of proof, since it was not incumbent upon the Board to search the record "for errors that may be lurking among the labyrinths"----- | 162 |
| 5. A statement made in a Bureau appeal decision which does not accurately reflect one evidentiary fact does not establish that the decision's other findings were erroneous, and this Board will sustain the Bureau's determination that mining claims are invalid where the entire record supports that conclusion----- | 589 |
| 6. Appeals from Bureau of Land Management decisions, which are not dispositive of the ultimate issues, will not be considered. They are properly dismissed as premature unless permission to appeal is first obtained from the Board of Land Appeals upon a showing that an immediate appeal may materially advance the final decision----- | 606 |

RULES OF PRACTICE—Continued
APPEALS—Continued

Burden of Proof

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| 1. A contractor whose work was disrupted and damaged as a result of the bursting of an oil pipeline (owned by a third party), which ran under the contract site and over which the contractor had, with the Government's approval, located its concrete batching plant, was not entitled to be compensated by the Government for the damage sustained on the ground that the damage resulted from the Government's failure to discharge its implied contractual obligation to provide a proper and safe construction site, in the absence of proof that the Government was responsible for the bursting, since the contractor bore the risk of loss under the Permits and Responsibilities clause of the contract----- | 162 |
| 2. Where the Government was found to be responsible for an indeterminate portion of a delay in having utility poles relocated on a road construction job and information having a direct bearing on the propriety of the amount of liquidated damages assessed was either in the possession of the Government or more accessible to it than it was to the appellant, no attempt should be made to apportion the delay between the parties and the Board therefore holds that the appellant is entitled to have the contract time | |

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extended to the date the contract was determined to be substantially complete.....	466
3. An appeal claiming the costs of repair of corrosion in four stainless steel clad surge tanks is denied where the Government has discharged its burden in showing by a preponderance of the evidence of record that the most probable causes of corrosion were welding defects, not allowed by the specifications, and contractor's failure to protect the interiors of the tanks from weld and gouge spatter...	547
4. The contracting officer's determination of the hours properly chargeable to the Government under a rental of equipment contract will be sustained where the contractor asserts that the hours claimed are reflected in its records but fails to offer any evidence in support of the claims made.....	607
5. Where the Government has made a <i>prima facie</i> showing of a lack of discovery, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery is upon claimant.....	709
Dismissal	
1. A motion to dismiss will be granted where the record on the motion shows that the Government has been prejudiced by the contractor's delay of at least	

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nine years in presenting notices of claims, or by failing to present to the contracting officer for that period of time data with respect to claims as to which notice was initially given. <i>Eggers & Higgins v. United States</i> , 185 Ct. Cl. 765 (1968)...	57
2. In the absence of a contract provision authorizing a contract price adjustment for delay, claims for pay-for-delay are breach of contract claims not within the Board's jurisdiction.....	57
3. Where claims presented on appeal by the contractor are in fact claims of subcontractors which, on the record, appear barred as enforceable claims against the contractor by a state statute of limitations, they will be dismissed...	57
4. Where an appeal record disclosed the existence of various disputes clearly cognizable under specific provisions of a contract for the construction of a dam, the Board is not deprived of jurisdiction over such disputes by virtue of the contractor's contention that they merged into and became part of a unitary, integrated claim for a "cardinal breach" arising out of the Government's course of conduct for which only the Court of Claims could grant adequate relief, since it is not for a board of contract appeals to determine that the cumulative effect of	

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- claims redressable under various contract clauses, combined with other Acts and non-acts of the Government traditionally regarded as breaches of contract, constitute a unitary, integrated claim for a breach of contract... 158
5. Claims for costs attributed to Government delays in relocating utility poles and in providing slope stakes arising on a project for the construction of a portion of the Natchez Trace Parkway (together with a derivative claim for stretchout and other delay costs) are dismissed as not within the purview of the Board's jurisdiction absent a pay-for-delay provision in the contract under which the claims would be cognizable.... 465
6. Where an appeal has been dismissed because it is deemed moot, and new facts adduced show that the appeal is justiciable, the appeal is properly considered on its merits... 533
7. Where four claims are asserted affirmatively for the first time in a notice of appeal and where thereafter the contractor fails to appeal the subsequent decision of the contracting officer denying the claims so asserted, the contracting officer's decision is final and conclusive under the express language of the Disputes Clause thereby requiring the dismissal of the four claims for lack of jurisdiction..... 607

RULES OF PRACTICE—Continued
APPEALS—Continued

Dismissal—Continued

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8. A claim asserted under the Suspension of Work clause for costs arising out of a delay in performance of a construction contract caused by the exhaustion of available funds following the Government's failure to appropriate additional moneys necessary to enable a contractor to complete the work prior to the time established by the contract and the President's subsequent impounding of such funds, which resulted in the contractor's election to stop work, was dismissed as being outside the Board's jurisdiction since the contract provided that the Government's liability for work costing in excess of a specified amount reserved and available for payment was contingent upon further appropriations and reservation, and the President's action was a sovereign act taken to halt inflation, neither of which is considered to be a stoppage by actual or constructive direction of the contracting officer in the administration of the contract within the meaning of the Suspension of Work clause..... 644
- Effect of**
1. The filing of a court action to review a decision of this Department does not automatically suspend the effect of the decision. This Board, however, may order a suspension of

RULES OF PRACTICE—Continued
APPEALS—Continued

Effect of—Continued

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the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed...

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Extensions of Time

1. Where the Government was found to be responsible for an indeterminate portion of a delay in having utility poles relocated on a road construction job and information having a direct bearing on the propriety of the amount of liquidated damages assessed was either in the possession of the Government or more accessible to it than it was to the appellant, no attempt should be made to apportion the delay between the parties and the Board therefore holds that the appellant is entitled to have the contract time extended to the date the contract was determined to be substantially complete.....

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Failure to Appeal

1. Where four claims are asserted affirmatively for the first time in a notice of appeal and where thereafter the contractor

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Failure to Appeal—Con.

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fails to appeal the subsequent decision of the contracting officer denying the claims so asserted, the contracting officer's decision is final and conclusive under the express language of the Disputes Clause thereby requiring the dismissal of the four claims for lack of jurisdiction.....

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Hearings

1. In the absence of a Board rule requiring that the Board member who presided at the hearing of an appeal prepare or participate in the decision, the failure of the Board to assign the preparation of an opinion to a retired, former member who conducted the hearing is not a violation of a contractor's constitutional rights, even where credibility and the demeanor of witnesses are in issue, since procedural process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the members of the Board rendering the decision.....
2. Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government erroneously staked the depth of the trench before rock was ultimately reached

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RULES OF PRACTICE—Continued
APPEALS—Continued

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at 60 feet, and the contracting officer issued a change order to compensate the contractor, *inter alia*, for the increased cost of dewatering the trench, the contractor contended that the amount allowed was inadequate, answers by an officer of the contractor to interrogatories propounded in a lawsuit against it by the dewatering sub-contractor arising out of this work, which refer to the failure and inadequacy of the sub-subcontractor's dewatering equipment and plan of dewatering are admissible as judicial admissions against interest by the contractor on the question of the contractor's entitlement to further compensation for dewatering difficulties allegedly resulting from the erroneous staking----

159

3. During an appeal taken under a contract for the construction of a tunnel, where the accuracy of certain benchmarks established by the Government is in issue, a survey performed by the Government after the work was completed in the course of the hearing of the appeal is admissible into evidence, since a substantial identity between the conditions which actually existed at the time the controversy arose and the subsequent

RULES OF PRACTICE—Continued
APPEALS—Continued

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conditions was established-----

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4. In an appeal in which the quantity of open cut excavation performed by a contractor is in issue, the contractor has introduced into evidence a series of 28 plats with an explanation purporting to demonstrate Government survey errors relating to open cut excavation, Government analyses of such documents are admissible. Since a contract appeals board has substantial latitude in the area of admission or exclusion of evidence, where the Board must deal with a complex, voluminous record, the Board will exercise that discretion and admit into evidence those items that appear designed to enhance its understanding of the issues and to assist it materially in the performance of its functions-----

161

5. Although there is no right to a formal hearing on a protest against an omitted lands survey, the Board of Land Appeals may, in its discretion, order a hearing on the factual issues where warranted by the circumstances-----

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6. Under the Administrative Procedure Act the record made at a hearing constitutes the exclusive record for decision except to the extent official notice of facts may be taken. Further evidence presented on appeal after

RULES OF PRACTICE—Continued
APPEALS—Continued

Hearings—Continued

an initial decision in a mining contest may not be considered or relied upon in making a final decision, but may only be considered to determine if there should be a further hearing-----

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Standing to Appeal

1. A transferee of a mining claim declared void *ab initio* by a decision of the Bureau of Land Management has standing to appear before the Board of Land Appeals in an appeal proceeding from that decision-----
2. Appeals from Bureau of Land Management decisions, which are not dispositive of the ultimate issues, will not be considered. They are properly dismissed as premature unless permission to appeal is first obtained from the Board of Land Appeals upon a showing that an immediate appeal may materially advance the final decision-----

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EVIDENCE

1. Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government erroneously staked the depth of the trench before rock was ultimately reached at 60 feet, and the contracting officer issued a

RULES OF PRACTICE—Continued
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change order to compensate the contractor, *inter alia*, for the increased cost of dewatering the trench, the contractor contended that the amount allowed was inadequate, answers by an officer of the contractor to interrogatories propounded in a lawsuit against it by the dewatering sub-subcontractor arising out of this work, which refer to the failure and inadequacy of the sub-subcontractor's dewatering equipment and plan of dewatering are admissible as judicial admissions against interest by the contractor on the question of the contractor's entitlement to further compensation for dewatering difficulties allegedly resulting from the erroneous staking-----

159

2. Where a contractor under a contract calling for the construction of a tunnel and an access shaft extending 200 feet downward from ground surface to the gate chamber in the tunnel excavated the shaft by means of blasting, and subsequently the Government redesigned the shaft, in part due to a funnel-shaped excavation caused by the contractor's blasting technique, the contractor is not entitled to be compensated for the cost of refilling the funnel-shaped excavation

RULES OF PRACTICE—Continued
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| since the record does not establish that such cost is attributable to a changed condition rather than to the contractor's blasting methods..... | Page
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| 3. During an appeal taken under a contract for the construction of a tunnel, where the accuracy of certain benchmarks established by the Government is in issue, a survey performed by the Government after the work was completed in the course of the hearing of the appeal is admissible into evidence, since a substantial identity between the conditions which actually existed at the time the controversy arose and the subsequent conditions was established..... | 161 |
| 4. In an appeal in which the quantity of open cut excavation performed by a contractor is in issue, where the contractor has introduced into evidence a series of 28 plats with an explanation purporting to demonstrate Government survey errors relating to open cut excavation, Government analyses of such documents are admissible. Since a contract appeals board has substantial latitude in the area of admission or exclusion of evidence, where the Board must deal with a complex, voluminous record, the Board will exercise that discretion and admit into evidence those items that appear designed to enhance its understanding | |

RULES OF PRACTICE—Continued
EVIDENCE—Continued

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| of the issues and to assist it materially in the performance of its functions.. | Page
161 |
| 5. A contractor whose work was disrupted and damaged as a result of the bursting of an oil pipeline (owned by a third party), which ran under the contract site and over which the contractor had, with the Government's approval, located its concrete batching plant, was not entitled to be compensated by the Government for the damage sustained on the ground that the damage resulted from the Government's failure to discharge its implied contractual obligation to provide a proper and safe construction site, in the absence of proof that the Government was responsible for the bursting, since the contractor bore the risk of loss under the Permits and Responsibilities clause of the contract..... | 162 |
| 6. A contractor in an appeal having a massive record, who alleges instances of inadequate payment under a contract for the construction of a dam, and in support thereof introduces into evidence various Government payment books unpaginated and some seven inches in thickness without clearly establishing such allegations by further specification or identification in such books, has not sustained its burden of proof, since it was not incumbent upon the Board to | |

RULES OF PRACTICE—Continued
EVIDENCE—Continued

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search the record "for errors that may be lurking among the labyrinths"--- 162

7. Recovery by a contractor under a contract for the construction of a dam who alleged that all of its claims against the Government were inseparable and that payment should be made on the basis of its total expenditures less contract receipts is denied where the contractor's records were such that allocation of costs to specific claims could be made and the reasonableness of such total costs and the Government's responsibility therefor were not established. In such circumstances the Board found that resort to the jury verdict approach for determining the amount of the equitable adjustment was warranted, since the Government's evidence respecting costs was also not segregated to specific claims.----- 163

8. Where the Government was found to be responsible for an indeterminate portion of a delay in having utility poles relocated on a road construction job and information having a direct bearing on the propriety of the amount of liquidated damages assessed was either in the possession of the Government or more accessible to it than it was to the appellant, no attempt should be made to apportion the delay between

RULES OF PRACTICE—Continued
EVIDENCE—Continued

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the parties and the Board therefore holds that the appellant is entitled to have the contract time extended to the date the contract was determined to be substantially complete.----- 466

9. A mining contestee is the true proponent under the Administrative Procedure Act that his claim is valid and, therefore, has the burden of overcoming the Government's *prima facie* case of no discovery with a preponderance of the evidence.----- 588

10. Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the evidence was presented. The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports and information on the claims.----- 682

11. The weight and credibility of evidence are matters properly considered by an Administrative Law Judge in the first instance. His findings, when in accord with the preponderance of the substantial and probative evidence adduced, will not be disturbed.----- 710

**RULES OF PRACTICE—Continued
GOVERNMENT CONTESTS**

1. Where the Secretary assumed jurisdiction of a mining claim contest by directing that the Hearing Examiner forward a recommended decision directly to the Department level, the Secretary was not bound by such directive to decide the case and it was not a violation of due process to return the case to the Director of the Bureau of Land Management to render the initial decision under the then prevailing adjudicative procedure.....
2. Under the Department rules governing government contests against mining claims, a contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and where he fails timely to file an answer to the allegations of the complaint, they will be taken as admitted and the mining claim which is subject of the contest is properly declared null and void without a hearing where one of the charges in the complaint alleges no discovery of a valuable mineral deposit.....
3. "*Community Property*." With respect to unpatented mining claims in states recognizing community property laws, the husband represents the community interest of himself and also his wife, and as to such interest the wife is considered to be in privacy with her husband, and where a government con-

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**RULES OF PRACTICE—Continued
GOVERNMENT CONTESTS—Con.**

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- test is brought against such an unpatented mining claim with only the husband named in the notice of contest and complaint, the wife is represented in said cause as though she had been expressly made a party thereto.....
4. In a Government contest against a mining claim where the Government has shown that the small market for dolomite useful for metallurgical purposes is being met by more competitive sources than the claim, the contestee then has the burden of proof to show by a preponderance of the evidence that the dolomite could be marketed at a profit for such purposes...
5. A mining claimant has not been denied due process when his claims are contested assertedly because a permit has been granted to a museum to perform archaeological work under the Antiquities Act, and where there was some prehearing newspaper publicity that the contest was being instituted but the claimant does not show that there was any unfairness in the contest proceeding itself.....
6. Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the

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evidence was presented.
 The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports and information on the claims..... 682

HEARINGS

1. A stipulation by a field solicitor at a hearing that the statutory requisites for the grant of a patent have been met does not preclude consideration in a further proceeding of any question vital to the determination of whether the requirements of the law have been met..... 43

2. Although there is no right to a formal hearing on a protest against an omitted lands survey, the Board or Land Appeals may, in its discretion, order a hearing on the factual issues where warranted by the circumstances.... 397

3. In a Departmental proceeding to determine the validity of a mining claim, an evidentiary hearing under the Administrative Procedure Act is required only if there is a disputed determinative question of fact; where the validity of a claim turns on the legal effect to be given to facts of record determining the status of the land when the claim was located no hearing is required..... 599

4. Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit

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issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ab initio* without a hearing... 600

5. Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the evidence was presented. The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports and information on the claims..... 682

6. Appellant's request for an opportunity to obtain new evidence for a further hearing in a mining claim contest will be denied where there has been no tender of proof which would tend to establish a valid discovery..... 690

**SUPERVISORY AUTHORITY OF
 SECRETARY**

1. Where the Secretary assumed jurisdiction of a mining claim contest by directing that the Hearing Examiner forward a recommended decision directly to the Department level, the Secretary was not bound by such directive to decide the case and it was not a violation of due

RULES OF PRACTICE—Continued
SUPERVISORY AUTHORITY OF
SECRETARY—Continued

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process to return the case to the Director of the Bureau of Land Management to render the initial decision under the then prevailing adjudicative procedure-----

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WITNESSES

1. Where, under a contract for the construction of a dam calling for excavation of a cutoff trench to sound rock (shown on the plans and specifications to be at a depth of 60 feet), the Government erroneously staked the depth of the trench before rock was ultimately reached at 60 feet, and the contracting officer issued a change order to compensate the contractor, *inter alia*, for the increased cost of dewatering the trench, the contractor contended that the amount allowed was inadequate, answers by an officer of the contractor to interrogatories propounded in a lawsuit against it by the dewatering sub-subcontractor arising out of this work, which refer to the failure and inadequacy of the sub-subcontractor's dewatering equipment and plan of dewatering are admissible as judicial admissions against interest by the contractor on the question of the contractor's entitlement to further compensation for dewatering difficulties allegedly resulting from the erroneous staking---

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SECRETARY OF THE INTERIOR

Page

1. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys-----

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STATE SELECTIONS

1. A homestead application must be rejected when filed at a time when the Master Title Plat in the local Bureau of Land Management office shows *prima facie* that the lands are embraced in a state selection application and the serial register sheet, referred to on the plat, shows that tentative approval has been given to the state selection for those lands-----

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STATUTORY CONSTRUCTION

GENERALLY

1. Congress intended that the automatic termination provision of 30 U.S.C. § 188 (1970) apply to the regular, annual rental payment, the necessity for which a lessee had continuous notice and that provision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued...
2. Congress intended that the automatic termination provision of 30 U.S.C. § 188 (1970) apply to the regular annual rental payment, the necessity for which a lessee had continuous notice. That pro-

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STATUTORY CONSTRUCTION— Continued

GENERALLY—Continued

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vision was not intended to apply to a case where a lessee had no way of knowing that the obligation had accrued-----

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3. The admission of Alaska into the Union did not repeal the statutes particularly applicable to that state, not related to its former territorial government. Therefore sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. § 615 (a) [formerly 48 U.S.C. § 421 (1958)] is still in effect, despite the existence of the general timber authorization contained in 30 U.S.C. § 601 (1970). The latter Act is deemed to be inapplicable to small sales of timber in Alaska since its authority is limited to situations where the disposition of the timber " * * * is not otherwise expressly authorized by law-----

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4. The Act of April 29, 1950, requiring the filing of a notice of location or a purchase application before an occupant of a trade and manufacturing site can be given credit for his occupancy, does not work an unlawful forfeiture of an occupancy right-----

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IMPLIED REPEALS

1. The admission of Alaska into the Union did not repeal the statutes particularly applicable to that state, not related to its former territorial government. Therefore sec. 11 of the Act of May 14, 1898, *as amended*, 16 U.S.C. § 615

STATUTORY CONSTRUCTION— Continued

IMPLIED REPEALS—Continued

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(a) [formerly 48 U.S.C. § 421 (1958)] is still in effect, despite the existence of the general timber authorization contained in 30 U.S.C. § 601 (1970). The latter Act is deemed to be inapplicable to small sales of timber in Alaska since its authority is limited to situations where the disposition of the timber " * * * is not otherwise expressly authorized by law-----

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SURVEYS OF PUBLIC LANDS

GENERALLY

1. In determining what land is conveyed under patents or grants of public land bordering on a meandered body of water, the general rule is that the waterline itself, not the meander line, constitutes the boundary except where there is fraud or gross error shown in the survey of the lines or where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines-----
2. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys-----
3. The action or inaction of Department employees cannot under the doctrines of estoppel or laches bar the Secretary of the Interior and his delegates

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SURVEYS OF PUBLIC LANDS—

Continued

GENERALLY—Continued

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| from discharging their duty to determine if public lands have been omitted from an original survey and to survey those lands found to have been omitted..... | Page
397 |
| 4. Although there is no right to a formal hearing on a protest against an omitted lands survey, the Board of Land Appeals may, in its discretion, order a hearing on the factual issues where warranted by the circumstances.... | 397 |

AUTHORITY TO MAKE

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|---|-----|
| 1. The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands and to extend or correct the surveys of public lands, as necessary, to include lands omitted from earlier surveys..... | 397 |
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TIMBER SALES AND DISPOSALS

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|---|-----|
| 1. The Secretary of the Interior is authorized under sec. 11 of the Act of May 14, 1898, <i>as amended</i> , 16 U.S.C. § 615(a) (1970) [formerly 48 U.S.C. § 421 (1958)], to promulgate regulations governing small sales of timber in Alaska which provide for competitive bidding. However, where regulations specifically provide for exclusively noncompetitive procedures for such sales, the general timber regulations, based upon 30 U.S.C. § 601 (1970) will be deemed not applicable..... | 410 |
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TIMBER SALES AND DISPOSALS—

Continued

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| 2. The admission of Alaska into the Union did not repeal the statutes particularly applicable to that state, not related to its former territorial government. Therefore sec. 11 of the Act of May 14, 1898, <i>as amended</i> , 16 U.S.C. § 615(a) [formerly 48 U.S.C. § 421 (1958)] is still in effect, despite the existence of the general timber authorization contained in 30 U.S.C. § 601 (1970). The latter Act is deemed to be inapplicable to small sales of timber in Alaska since its authority is limited to situations where the disposition of the timber " * * is not otherwise expressly authorized by law."..... | Page
410 |
| 3. A timber sale is a lump-sum sale where the purchase price is not contingent on the volume of timber to be recovered. Where a timber sale contract provides for a lump-sum payment for removal of all trees marked with blue paint within a designated area, liability for payment may not be adjusted to the volume of the timber so designated and sold..... | 567 |
| 4. Where the BLM timber sale contract specifically disclaims the warranty as to volume, none arises..... | 567 |
| 5. A disclaimer of warranty of quantity in a BLM timber sale contract is not unconscionable pursuant to § 2-302 of the Uniform Commercial Code..... | 567 |

WITHDRAWALS AND

RESERVATIONS

GENERALLY

1. A claimant's occupancy of a trade and manufacturing site prior to a withdrawal does not establish a "valid existing right" excepted by the withdrawal where credit for his occupancy prior to the withdrawal cannot be given under the Act of April 29, 1950, because the claimant did not file a notice of location or purchase application prior to the withdrawal----- Page 636

POWER SITES

1. Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Commission had granted a license for a transmission line are subject to the reservation prescribed by section 24 of the Federal Power Act regardless of whether or not the reservation was stated in the patent----- 67
2. Under the Mining Claims Rights Restoration Act of 1955, public land within a preliminary permit issued by the Federal Power Commission under the Federal Power Act is not open to entry under the mining laws; a mining claim located after the permit has issued is properly declared void *ab initio* without a hearing-- 600

WORDS AND PHRASES

1. "*Community Property*." With respect to unpatented mining claims in states recognizing community property laws, the husband represents the community interest of him-

WORDS AND PHRASES—Con.

- self and also his wife, and as to such interest the wife is considered to be in privity with her husband, and where a government contest is brought against such an unpatented mining claim with only the husband named in the notice of contest and complaint, the wife is represented in said cause as though she had been expressly made a party thereto----- Page 155
2. *Dictum*: With regard to cancellation of an oil or gas lease, the terms "known geologic structure" and "known to contain valuable deposits of oil or gas" could be distinguished on the basis that the presumptive productivity referred to in the definition of known geologic structure may be a matter of expert opinion, whereas the words "known to contain valuable deposits" connote matters of actual fact. 43 CFR 3100.0-5 and 3108.3----- 440
3. "*Primary Term*." An oil and gas lease which has been extended and has vitality only by reason of its inclusion in a producing unit is not within its "primary term" within the ambit of 30 U.S.C. § 226-1(d) (1970)----- 533
4. "*Primary Term*" in that context includes all definite and finite periods of extension fixed by law. It does not include any period of time whose termination depends upon the occurrence or non-occurrence of a contin-

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gency, <i>e.g.</i> , the cessation or continuation of pro- duction-----	Page 533
5. " <i>Competitive Bidding</i> ." Com- petitive bidding does not require that more than	

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one bid be submitted before the authorized offi- cer, but only that the officer, by due advertise- ment, give opportunity for everyone to bid-----	Page 596
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